

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

SOUTH ZONAL BENCH

BANGALORE

Application(s) Involved:

E/Cross Objections/20069 & 20770/2016

Appeal(s) Involved:

E/20578 & 20816/2016-SM

[Arising out of:

(i) Order-in-Appeal No. CAL-EXCUS-000-APP-477-15-16 dated 28.1.2016 passed by Commissioner of Central Excise, Customs & Service Tax (Appeals-II), Cochin.

(ii) Order-in-Appeal No. CAL-EXCUS-000-APP-503-15-16 dated 29.2.2016 passed by Commissioner of Central Excise, Customs & Service Tax (Appeals-II), Cochin.]

Commissioner of Central Excise, Calicut Commissionerate

CR BUILDINGS,

Manachira,

CALICUT 673 001.

KERALA

Appellant(s)

Versus

M/s. Orion Battery

Poovattuparamba

P.O. Peruvayal,

KOZHIKODE 673 024.

KERALA

Respondent(s)

Appearance:

Mr. M. P. Nazir, Consultant

Rasha n Associates

CD Tower 2nd Floor,

Arayidathupalam,

Mini Bye-pass Road,

KOZHIKODE - 673 004.

For the Appellant

Mr. N. Jagadish, Superintendent (AR)

For the Respondent

Date of Hearing: 14/02/2017

Date of Decision: 09/05/2017

CORAM:

HON'BLE SHRI S.S GARG, JUDICIAL MEMBER

Final Order No. 20665 - 20666 / 2017

Per : S.S GARG

Revenue has filed these two appeals against two impugned order dated 28.1.2016 and 29.2.2016 passed by the Commissioner (A). Since the issue involved in both the appeals is identical, therefore both the appeals are being disposed of by this common order. For the sake of convenience, the facts of appeal No.20578 are taken.

2. The facts of the present case are that the assessee-respondent are manufacturers of batteries. They are availing CENVAT credit under Rule 3 of CENVAT Credit Rules 2002 on the inputs used in the manufacture of final products. They had exported the batteries under a Letter of Undertaking during the period from 1.4.2012 to 30.6.2012. Since they were not in a position to utilize the CENVAT credit in respect of inputs used in the manufacture of final products exported, they filed refund application under Rule 5 of CENVAT Credit Rules (CCR), 2004 for refund of CENVAT credit. The ground for rejection of refund claim in the notice was that the claim was filed under Rule 5 of CENVAT Credit Rules, 2004 as existed prior to CENVAT Credit (Third Amendment) Rules, 2012. Vide the Order-in-Original, the claim was rejected on the ground that the claimant is ineligible for refund under Rule 5 of CCR, 2004 as they had claimed drawback under the Customs and Central Excise Duties under Drawback Rules, 1995. Aggrieved by the said order, the assessee filed appeal before the Commissioner (A) who modified the Order-in-Original and directed the Assistant Commissioner to consider the refund claim by adopting erstwhile Rule 5 of CENVAT Credit Rules. Aggrieved by the said order, the Revenue filed the present appeal.

3. Heard both the parties and perused the records.

4. Learned AR for the Revenue submitted that the impugned order is not sustainable in law as the same has been passed by ignoring the statutory provision. He further submitted that the refund claim was filed under erstwhile Rule 5 of CENVAT Credit Rules whereas CENAT Credit (Third Amendment) Rules, 2012, were amended w.e.f 1.4.2012 and the earlier provisions were not applicable to the assessee. He further submitted that the refund of excise duty paid on inputs is barred under Rule 5 of the CENVAT Credit Rules once the drawback was availed by the assessee.

5. On the other hand, the learned counsel for the assessee filed the cross-objections and defended the impugned orders. He further submitted that the original authority has travelled beyond the show-cause notice by rejecting the claim of the assessee on the ground which was never convessed in the notice and the assessee was never called upon to answer. He further submitted that the original authority has disallowed the refund merely on the ground that the assessee has availed the drawback. He further submitted that this finding is against para 5 of CBEC Circular No.83/2000-Cus. dated 16.10.2000 which is extracted below:

5. It is, therefore, clarified that where only Customs portion of duties is claimed as per the All Industry Rate of Drawback, Rule 57F(14), does not come in the way of admitting refund of unutilized credit of Central Excise / Countervailing duty paid on inputs used in products exported.

5.1 He further submitted that for the next quarter July to September 2012, the assessee filed refund claim on 28.6.2013 for Rs.92,976/- which was allowed vide Order-in-Original No.17/13-14 dated 30.10.2013 and the appeal against which by the department was rejected by the Commissioner (A), Cochin vide Order-in-Appeal dated 29.2.2016 against which the Department has filed the second appeal No. E/20816/2016, which is also being disposed of by this order.

6. After hearing the submissions of both the parties and perusal of the material on record, I find that as per CBEC Circular No.83/2000 dated 16.10.2000 which is cited supra, the Board has clarified that even if the assessee has claimed drawback even then he is entitled to claim refund under Rule 5 of CCR. Further, I find that in the case of Commissioner of Central Excise, Khanpur vs. Meghdoot Pistons (P) Ltd. reported in 2006 (201) ELT 398 wherein it has been observed that It is clear from the above clarification of the Board that refund of MODVAT credit or CENVAT credit (Central Excise duty) has no relation to grant of drawback relatable to custom duties.

6.1 Further, I also find that the learned Commissioner (A) has considered all the grounds raised by the assessee and the department and has observed in para 13 as under:

13. I have carefully studied the records of the case and grounds of appeal, written submissions and case laws submitted by the appellant. The ground canvassed in the Show-cause notice for rejection of the claim was that the claim was filed under Rule 5 of the Cenvat Credit Rules, 2004 as existed prior to Cenvat Credit (Third Amendment) Rules, 2012. But I find that the amending Rule itself had a provision to consider claims under the erstwhile Rule within a year from the amendment. But the refund claim was rejected vide the impugned order on the ground that the claimant is ineligible for refund under Rule 5 of the Cenvat Credit Rules as he had claimed drawback under the Customs and Central Excise Duties Drawback Rules, 1995. The CBEC Circular No.35/2010 dated 17.9.2010 has clarified that the Customs component of AIR Drawback shall be available even if the rebate of Central Excise duty paid on raw materials used in the manufacture of exported goods has been taken in terms of Rule 18 of Central Excise Rules, 2002. It therefore follows that the appellant is eligible for rebate of Central Excise duty paid on inputs used in the manufacture of export goods, even in case where customs duty component is claimed as drawback. In view of the above discussions, I hold that the order of the respondent rejecting the claim of the appellant for the refundable amount appears to be not correct. The Assistant Commissioner of Central Excise, Customs and Service Tax, Kozhikode Division, Kozhikode shall consider the refund claim by adopting erstwhile Rule 5 and decide on merit.

7. In view of my above said discussions, I do not find any infirmity in the impugned orders passed by the Commissioner (A) and therefore, I uphold both the impugned orders by dismissing the appeals of the Revenue.

8. The cross objections filed by the assessee are, accordingly, disposed of.

(Order was pronounced in Open Court on 09/05/2017.)

S.S GARG

JUDICIAL MEMBER