आयुक्त (अपील) का कार्यालय,

Office of the Commissioner (Appeal),

केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद

Central GST, Appeal Commissionerate, Ahmedabad

जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.

CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015

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रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(ST)180/Ahd-South/2019-20/16093 TO 16097

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP- 50/2020-21

दिनाँक Date : 29-09-2020 जारी करने की तारीख Date of Issue 23/10/2020

श्री अखिलेश कुमार आयुक्त (अपील) द्वारा पारित

Passed by Shri. Akhilesh Kumar, Commissioner (Appeals)

ग Arising out of Order-in-Original No CGST-VI/Ref-42/MK/AC/Top/19-20 dated 31.10.2019 issued by Assistant Commissioner, Div-VI, Central Tax, Ahmedabad-South.

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

M/s Top Infrastructure Private Limited, 203, Anand Milan Complex, Opp. Navrangpura Jain Derasar, Navrangpura, Ahmedabad-380009.

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal issued under the Central Excise Act 1944,may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(c) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो डयूटी केडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(d) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए–8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनॉक से तीन मास के भीतर मूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35–इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर–6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहॉ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/– फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/– की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:–

Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केंद्रीय जीएसटी अधिनियम, 2017 की धारा 112 के अंतर्गत:–

Under Section 112 of CGST act 2017 an appeal lies to :-

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में 2nd माला, बहुमाली भवन ,असरवा ,गिरधरनागर,अहमदाबाद –380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor,Bahumali Bhawan,Asarwa,Girdhar Nagar, Ahmedabad : 380004. in case of appeals other than as mentioned in para-2(i) (a) above.

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता हैं।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention in invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(14) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपीलो के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है ।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

(15)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

(i) *(Section)* खंड 11D के तहत निर्धारित राशि;
(ii) लिया गलत सेनवैट क्रेडिट की राशि;
(iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇨ यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील' दाखिल करने के लिए पूर्व शर्त बना दिया गया है
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

Under Central Excise and Service Tax, "Duty demanded" shall include:

(xiii) amount determined under Section 11 D;
(xiv) amount of erroneous Cenvat Credit taken;
(xv) amount payable under Rule 6 of the Cenvat Credit Rules.

इस इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

6(I) In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."

II. **Any person aggrieved by an Order-In-Appeal issued under** the Central Goods and Services Tax Act,2017/Integrated Goods and Services Tax Act,2017/ Goods and Services Tax(Compensation to states) Act,2017,may file an appeal before the appellate tribunal whenever it is constituted within three months from the president or the state president enter office.

ORDER-IN-APPEAL

1. This order arises out of an appeal filed by M/s Top Infrastructure Private Limited, 203 Anand Milan Complex, Opp. Navrangpura Jain Derasar, Navrangpura, Ahmedabad-380009 (hereinafter referred to as *'appellant'*) against Order in Original No. CGST-VI/Ref-42/MK/AC/Top Infra/2019-20 dated 31.10.2019 [hereinafter referred to as *'the impugned order'*) passed by the Assistant Commissioner of Central Tax, Division VI, Ahmedabad South (hereinafter referred to as 'the adjudicating authority').

2. Facts of the case, in brief, are that the appellant was engaged in providing taxable service under the category "Business Auxiliary Services" as defined under erstwhile Section 65(105)(zzb) of the Finance Act, 1994 and holding Service Tax Registration Number AACCT1801DSD001. They have filed refund claim of CENVAT Credit balance amounting to Rs. 8,92,361/- as on 31.03.2017 on the grounds that due to closure of business the registration have been surrendered by them on 06.05.2017. The above mentioned refund claim was filed on 29.06.2018 and was rejected vide OIO No. CGST-VI/Ref-109/SKC/TOP/2018-19 dated 30.11.2018 by the then Assistant Commissioner, CGST, Division-VI, Ahmedabad-South on the grounds that the CENVAT Credit Rules, 2004 does not allow the refund of balance lying in CENVAT account. Being aggreived with the above mentioned Order In Original, the appellant had filed an appeal before the Commissioner (Appeals), Central Tax, Ahmedabad, who in turn vide OIA No. AHM-EXCUS-001-APP-0169-2018-19 dated 25.03.2019 had remanded the matter back to the adjudicating authority without going into the details of the case and directed the adjudicating authority to adhere to the principal of natural justice. The refund claim was subsequently rejected by the adjudicating authority vide the impugned order.

3. Being aggrieved with the impugned order, the appellant preferred this appeal on the grounds that:

a. The order was issued without evaluating correct situation and grounds mentioned in refund application. Since, the Service Tax Registration was surrendered on 06.05.2017 i.e. before roll out of GST, the CENVAT credit could not be carried forward. Adjudicating Authority has erred in rejecting the claim in violation of well settled principle that limitation of one year is not applicable where tax paid is not required to be paid.

b. The appellant did not file refund claim of the aforesaid Input Tax Credit irrespective of the fact that they were migrated in GST under Section 139 of the CGST Act, 2017 based on the fact that they intend to close the operation of their business in the above mentioned Service Tax registration. Also, the appellant cancelled their GST

Registration No. 24AACCT1801D1Z2 w.e.f. 01.07.2017 and for that reason did not file Trans-1 Form claiming the Input Tax Credit.

c. The adjudicating authority failed to appreciate the fact that their refund claim is not covered under Section 11B of the Central Excise Act, 1994 but ought to have governed under Section 17 of the Limitation Act.

4. The appellant placed reliance on the following Judgements:

(i) Joshi Technologies International v/s Union of India reported as 2016(339) ELT21 (Guj);

(ii) Union of India v/s Slovak India Trading Co. P L repored as 2008 (223) E.L.T. A170 (SC);

(iii) Naffar Chandra Jute Mills Limited v/s Assistant Collector of Central Excise reported at 1993(66) ELT574 (Cal);

(iv) Commissioner of Central Excise, Ahmedabad v/s Surya International reported as 2010 (262) E.L.T. 968 (Tri.-Ahmd.);

(v) Commissioner of Service Tax, Banglore v/s Motor World reported as 2012 (27) S.T.R. 225 (Kar.).

5. Personal Hearing in the case was held on 18.09.2020. Shri Pravin Dhandharia, Chartered Accountant, attended hearing on behalf of the appellant. He reiterated submissions made in appeal memorandum. He also stated that he would submit case laws in support of his contentions.

6. I have carefully gone through the facts of the case available on record, grounds of appeal and oral submissions made by the appellant at the time of hearing. It is observed that the issue to be decided in this case is whether the appellant is eligible for refund of CENVAT Credit balance lying in their account at the time of closure of their unit.

7. It is observed that the appellant was having a balance of of CENVAT Credit amount of Rs. 8,92,361/- at the time of surrender of their registration on 06.05.2017 due to closure of their business. The adjudicating authority has rejected the refund claim by holding that no such remedy in such a case is available in CENVAT Credit Rules, 2004. He has further held that the provisions of Limitation Act, 1963 is not applicable to this case as there was specific provision of filing refund claim within one year under Section 11B of the Central Excise Act, 1944. He held that the refund claim was also time-barred under Section 11B of the Act ibid.

8. The relevant legal provisions contained under Section 11B of the Central Excise Act, 1944 is reproduced below:

Section 11B. Claim for refund of duty and interest, if any, paid on such duty -

(1) Any person claiming refund of any duty of excise and interest, if any, paid on such duty may make an application for refund of such duty and interest, if any, paid on such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of one year from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of duty of excise and interest, if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person :

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) substituted by that Act :

Provided further that the limitation of one year shall not apply where any duty and interest, if any, paid on such duty has been paid under protest.

(2) If, on receipt of any such application, the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise and interest, if any, paid on such duty paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund :

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) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(b) unspent advance deposits lying in balance in the applicant's account current maintained with the Principal Commissioner of Central Excise or Commissioner of Central Excise;

(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;

(d) the duty of excise and interest, if any, paid on such duty paid by the manufacturer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(e) the duty of excise and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(f) the duty of excise and interest, if any, paid on such duty borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify :

Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty and interest, if any, paid on such duty has not been passed on by the persons concerned to any other person.

8.1 The relevant legal provisions under Section 17 of the Limitation Act, 1963 is reproduced below:

Section 17(1) in The Limitation Act, 1963

(1) Where, in the case of any suit or application for which a period of limitation is prescribed by this Act,—

(a) the suit or application is based upon the fraud of the defendant or respondent or his agent; or

(b) the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of any such person as aforesaid; or

(c) the suit or application is for relief from the consequences of a mistake; or

(d) where any document necessary to establish the right of the plaintiff or applicant has been fraudulently concealed from him, the period of limitation shall not begin to run until plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it; or in the case of a concealed document, until the plaintiff or the applicant first had the means of producing the concealed document or compelling its production:

Provided that nothing in this section shall enable any suit to be instituted or application to be made to recover or enforce any charge against, or set aside any transaction affecting, any property which—

(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know, or have reason to believe, that any fraud had been committed, or

(ii) in the case of mistake, has been purchased for valuable consideration subsequently to the transaction in which the mistake was made, by a person who did not know, or have reason to believe, that the mistake had been made, or

(iii) in the case of a concealed document, has been purchased for valuable consideration by a person who was not a party to the concealment and, did not at the time of purchase know, or have reason to believe, that the document had been concealed.

9. It is observed that the instant case does not fall within Section 17 of the Limitation Act, 1963 in as much as there is no element of fraud, concealment or mistake involved in this case. The legal provisions as well as the CENVAT Credit balance was known to the appellant at the time of surrender of registration. Hence, their contention is liable for rejection on merits.

10. I further find that the appellant has wrongly relied upon the case laws in case of Naffar Chandra Jute Mills Limited v/s Assistant Collector of Central Excise, Commissioner of Central Excise, Ahmedabad v/s Surya International and Commissioner of Service Tax, Banglore v/s Motor World. The above mentioned case laws are applicable in case where two or more than two options are available to the assessee and it is for the assessee to choose any option which is beneficial to them. However, in the present case, as the adjudicating authority has observed, no refund claim is to be allowed since Rule 5 of the CENVAT Credit Rules, 2004 clearly specifies the terms and conditions wherein the refund of CENVAT Credit is to be allowed. The above mentioned rule is reproduced verbatim:

Rule 5.Refund of CENVAT credit. -

Where any input or input service is used in the manufacture of final product which is cleared for export under bond or letter of undertaking, as the case may be, or used in the intermediate product cleared for export, or used in providing output service which is exported, the CENVAT credit in respect of the input or input service so used shall be allowed to be utilized by the manufacturer or provider of output service towards payment of,

(i) duty of excise on any final product cleared for home consumption or for export on payment of duty; or

(ii) service tax on output service,

and where for any reason such adjustment is not possible, the manufacturer or the provider of output service shall be allowed refund of such amount subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification:

Provided 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 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 Export of Service Rules, 2005 in respect of such tax.

Provided further that no credit of the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act shall be utilised for payment of service tax on any output service.

Explanation: For the purposes of this rule, the words "output service which is exported" means the output service exported in accordance with the Export of Services Rules, 2005.

11. Section 142(3) of the CGST Act is reproduced verbatim:

(2) Every claim for refund filed by any person before, on or after the appointed day, for refund of any amount of CENVAT credit, duty, tax, interest or any other amount paid under the existing law, shall be disposed of in accordance with the provisions of existing law and any amount eventually accruing to him shall be paid in cash, notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944:

Provided that where any claim for refund of CENVAT credit is fully or partially rejected, the amount so rejected shall lapse:

Provided further that no refund shall be allowed of any amount of CENVAT credit where the balance of the said amount as on the appointed day has been carried forward under this Act.

The above mentioned Section clearly states that any refund claim filed shall be disposed of in accordance with the provisions of the existing law. Hence, in the instant case the refund claim filed should be dealt with as per the provisions of Section 11B of the Central Excise Act, 1944.

12. Further, I find that the same issue has been discussed in detail by the Hon'ble High Court of Judicature at Bombay in the case of Gauri Plasticure Private Limited v/s CCE Indore [2018 (360) E.L.T. 967 (Bom.)] wherein Hon'ble High Court vide order dated 28.04.2018 has referred the matter to the Larger Bench in order to decide the following questions of law:

"(a) Whether cash refund is permissible in terms of clause (c) to the proviso to section 11B(2) of the Central Excise Act, 1944 where an assessee is unable to utilize credit on inputs?

(b) Whether by exercising power under Section 11B of the said Act of 1944, a refund of un-utilised amount of Cenvat Credit on account of the closure of manufacturing activities can be granted?

(c) Whether what is observed in the order dated 25th January 2007 passed by the Apex Court in Petition for Special Leave to Appeal (Civil) No. CC 467 of 2007 (Union of India vs Slovak India Trading Company Pvt Ltd.) can be read as a declaration of law under Article 141 of the Constitution of India?"

13. The larger bench of Hon'ble High Court, Bombay in its judgement dated 14.06.2019 reported at 2019(30)GSTL 224(Bom) had discussed the issue at length. The relevant portion of discussion finding given by the Hon'ble Court is as under:

21. Therefore, the attempt of the High Court to read down the provision by way of substituting the word "or" by an "and" so as to give relief to the assessee is found to be erroneous. In that regard the submission of the counsel for the appellant is well founded that once the said credit is taken the beneficiary is at liberty to utilise the same, immediately thereafter, subject to the Credit Rules."

22. In the case at hand, we are considering a claim of refund of duty. Section 11B(1) clearly says that a person claiming refund has to make an application for refund of such duty before the expiry of the period prescribed and in such form and manner. The application has to be accompanied by such documentary or other evidence as the applicant may furnish to establish that the amount of duty of excise, in relation to which such refund is claimed, was collected from or paid by him and incidence of such duty had not been passed by him to any other person. The later provision enabling the claiming of refund is now worded differently. We have reproduced it and now it is only when the proviso is attracted that the amount of refund can be paid over to the applicant or else it has to be credited to the fund. Even earlier, the amount used to be credited to the fund, but the proviso says that instead of being credited to the fund, it can be paid to the applicant if such amount in this case is relatable to refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made. The crucial words are that "the 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". If the excisable goods are not used as inputs in accordance with the rules made, to our mind, there is no question of any refund. Our view gets support and reinforcement from the language of the rules themselves. Mr.Patil relies upon Rule 5 of the Cenvat Credit Rules, 2004. That Rule reads as under:-

"RULE 5. Refund of CENVAT Credit.- Where any input or input service is used in the final products which is cleared for export under bond or letter of undertaking, as the case may be, or used in the imtermediate products cleared for export, or used in providing output service which is exported, the CENVAT credit in respect of the input or input service so used shall be allowed to be utilized by the manufacturer or provider of output service towards payment of,

(i) duty of excise on any final products cleared for home consumption or for export on payment of duty; or

(ii) service tax on output service, and where for any reason such adjustment is not possible, the manufacturer shall be allowed refund of such amount subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification:

Provided 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 Drawback Rules, 1995, or claims a rebate of duty under the Central Excise Rules, 2002, in respect of such duty.

Provided further that no credit of the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, as amended by clause 72 of the Finance Bill, 2005, the clause which has, by virtue of the declaration made in the said Finance Bill, under the Provisional Collection of Taxes Act, 1931, the force of law, shall be utilised for payment of service tax on any output service.

Explanation : For the purposes of this rule, the words 'output service which are exported' means any output service in respect of which payment is received in India in convertible foreign exchange and the same is not repatriated from, or sent outside, India.

Provided that the CENVAT credit or inputs shall not be denied to job worker referred to in rule 12AA of the Central Excise Rules, 2002, on the ground that the said inputs are used in the manufacture of goods cleared without payment of duty under the provisions of that rule."

23. Thus, a perusal of this rule indicates that where any input or input service is used in the final product, which is cleared for export etc. or used in the intermediate product cleared for export or used for providing output service which is exported, then, the Cenvat Credit in respect of the input or input service so used shall be allowed to be utilised by the manufacturer or provider of output service towards payment of duty of excise on any final product cleared for home consumption or for export on payment of duty or service tax on output service. Whether for any reason, such adjustment is not possible, the manufacturer shall be allowed refund of such amount subject to such safeguards, conditions and limitation as may be specified by the Central Government by a notification.

24. The word input is defined in Rule 2(k) of the Cenvat Credit Rules, 2004 to mean all goods used in the factory by the manufacturer of the final product or all goods including accessories, cleared along with the final product, the value of which is included in the value of the final product and goods used for providing free warranty for final products or all goods used for generation of electricity or steam for captive use or all goods used for providing any output service. We are not concerned with the excluded portion, but the consistent thread is that input means all goods used in the factory by the manufacturer of the final product. In the situation that is presented before us and particularly in the central excise appeals at hand, it is evident that the order-in-original has been passed by accepting the plea that the assessee was availing Cenvat Credit of duties paid on the inputs purchased and was utilising the same for payment of additional duties of excise on final products at the time of clearance of the same. According to the case of the assessee, by a notification dated 9th July, 2004, the Government of India had exempted all goods appearing within the Schedule of the said Act of 1978. The assessee utilised credit balance of additional duty of excise in their RG-23A Part II Register as on 6th September, 2004, which could not be utilised in future and had remained un- utilised. The condition was that since none of the products are charged to additional duties of excise, it would not be possible to utilise the said un-utilised credit and the assessee was liable for cash refund. This plea was not accepted in the order-in-original, but came to be accepted by the appellate authority. The Revenue

approached the CESTAT against the appellate authority's view, but the CESTAT dismissed the Revenue's appeal. Now, if the cash refund was not permissible, then, it is evident that by reading into the provision something which is expressly not there, such a refund was sought.

25. In the case of Commissioner of Central Excise vs. Gujarat Narmada Fertilizers Company Limited7, the Hon'ble Supreme Court construed the provisions and held as under:-

"15: As can be seen from the submissions, the contention of the assessee is that exclusion of fuel inputs from the purview of sub-rule (2) of Rule 6 would mean that such inputs are also automatically excluded from sub-rule (1) whereas according to the Department sub-rule (1) is a general rule which provides, that except for the circumstances mentioned in sub-rule (2), CENVAT Credit shall not be allowed on such quantity of inputs used in the manufacture of exempted goods and even though fuel inputs are excluded from sub-rule (2), such inputs would still fall under sub-rule (1).

16. In our view, sub-rule (1) is plenary. It restates a principle, namely, the CENVAT credit for duty paid on inputs used in the manufacture of exempted final products is not allowable. This principle is inbuilt in the very structure of the CENVAT scheme. Sub-rule (1), therefore, merely highlights that principles. Sub-rule (1) covers all inputs, including fuel, whereas sub-rule (2) refers to non-fuel inputs. Sub-rule (2) covers a situation where common cenvatted inputs are used in or in relation to manufacture of dutiable final product and exempted final product but the fuel input is excluded from that sub-rule. However, exclusion of fuel input vis-a-vis non-fuel input would still fall in sub-rule (1). As stated above, sub-rule (1) is plenary, hence, it cannot be said that because sub-rule (2) is inapplicable to fuel input(s), CENVAT credit is automatically available to such inputs even if they are used in the manufacture of exempted goods."

26. This view follows that taken in the case of Maruti Suzuki Limited vs. Commissioner of Central Excise, Delhi III 8. In this judgment, the Hon'ble Supreme Court held as under:-

"28. Coming to the statutory definition of the word "input" in Rule 2(g) in the CENVAT Credit Rules, 2002, it may be noted that the said definition of the word "input" can be divided into three parts, namely :

(i) specific part

(ii) inclusive part

(iii) place of use

Coming to the specific part, one finds that the word "input" is defined to mean all goods, except light diesel oil, high speed diesel oil and petrol, used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not. The crucial requirement, therefore, is that all goods "used in or in relation to the manufacture" of final products qualify as "input". This presupposes that the element of "manufacture" must be present.

29. In J.K.Cotton Spg. & Wvg. Mills Co. Ltd. v. STO [AIR 1965 SC 1310:(1965) 16 STC 563] this Court held that the expression "in the manufacture of goods" should normally encompass the entire process carried on by the dealer of converting raw material into finished goods. It was further held that where any particular process (generation of electricity) is so integrally connected with the ultimate production of goods, that, but for such process, manufacture of goods would be inexpedient, then goods required in such process would fall within the expression "in the manufacture of goods".

30. In Union Carbide India Ltd. v. CCE [(1996) 86 ELT 613 (Tri)] a larger Bench of CEGAT observed that a wide impact of the expression "used in relation to manufacture" must be allowed its natural play. Inputs (raw materials) used in the entire process of conversion into finished products or any other process (like electricity generation) which is integrally connected with the ultimate production of final product has to fall within the above expression. It was observed that the purpose was to widen the scope, ambit and content of "inputs". According to the Special Bench of CEGAT, the purpose behind the above expression is to widen the ambit of the definition so as to attract all goods, which do not enter directly or indirectly into the finished product, but are used in any activity concerned with or pertaining to the manufacture of the finished product.

34. In the past, there was a controversy as to what is the meaning of the word "input", conceptually. It was argued by the Department in a number of cases that if the identity of the input is not contained in the final product then such an item would not qualify as input. In order to get over this controversy in the above definition of "input", the legislature has clarified that even if an item is not contained in the final product still it would be classifiable as an "input" under the above definition. In other words, it has been clarified by the definition of "input" that the following considerations will not be relevant :

(a) use of input in the manufacturing process be it direct or indirect;

(b) even if the input is not contained in the final product, it would still be covered by the definition.

These considerations have been made irrelevant by the use of the expression "goods used in or in relation to the manufacture of final product" which, as stated above, is the crucial requirement of the definition of "input".

38. In each case it has to be established that inputs mentioned in the inclusive part are "used in or in relation to the manufacture of final product". It is the functional utility of the said item which would constitute the relevant consideration. Unless and until the said input is used in or in relation to the manufacture of final product within the factory of production, the said item would not become an eligible input. The said expression "used in or in relation to the manufacture" has many shades and would cover various situations based on the purpose for which the input is used. However, the specified input would become eligible for credit only when used in or in relation to the manufacture of final product."

27. The attempt made to rely upon the transitional provision, particularly Rule 11 carries the case no further. Rule 11 of the Cenvat Credit Rules, 2004 reads as under:-

"Rule 11. Transitional provision.- (1) Any amount of credit earned by a manufacturer under the CENVAT Credit Rules, 2002, as they existed prior to the 10 th day of September, 2004 or by a provider of output service under the Service Tax Credit Rules, 2002, as they existed prior to the 10th day of September, 2004, and remaining unutilized on that day shall be allowed as CENVAT credit to such manufacturer or provider of output service under these rules, and be allowed to be utilized in accordance with these rules.

(2) A manufacturer who opts for exemption from the whole of the duty of excise leviable on goods manufactured by him under a notification based on the value of quantity of clearances in a financial year, and who has been taking CENVAT credit on inputs or input services before such option is exercised, shall be required to pay an amount equivalent to the CENVAT credit, if any, allowed to him in respect of inputs lying in stock or in process or contained in final products lying in stock on the date when such option is exercised and after deducting the said amount from the balance, 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 excisable goods, whether cleared for home consumption or for export.

(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. (4) A provider of output service shall be required to pay an amount equivalent to the CENVAT credit, if any, taken by him in respect of inputs received for providing the said service and is lying in stock or is contained in the

taxable service pending to be provided, when he opts for exemption from payment of whole of the service tax leviable on such taxable service under a notification issued under section 93 of the Finance Act, 1994 (32 of 1994) 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 excisable goods, whether cleared for home consumption or for export or for payment of service tax on any other output service, whether provided in India or exported."

28. It is evident from a reading of the transitional provision that any amount of credit earned by a manufacturer under the Cenvat Credit Rules, 2002, as they existed prior to the 10 th September, 2004 or by a provider of output service under the Service Tax Credit Rules, 2002 as they existed prior to 10 th September, 2004 and remaining un-utilised on that day shall be allowed as Cenvat Credit to such manufacturer or provider of output service under these rules, and be allowed to be utilised in accordance with these rules. This is how the transitional provision enables carrying forward of the un-utilised Cenvat Credit. That is a distinct contingency altogether. That transitional provision does not enable us to hold that the amount of un-utilised Cenvat Credit can be refunded in cash.

29. We do not think that by taking assistance of this provision, we will be able to hold as contended by Mr.Patil that the Cenvat Credit can be refunded even in relation to those inputs which have not been used in the manufacture of the final product or the exported goods. We are called upon to read something in the substantive rule and which is totally absent therein. When Rule 5 follows Rule 4, which is titled as "Conditions for Allowing Cenvat Credit", then, we must understand the scheme in such manner as would make the law workable and consistent. Refund of Cenvat Credit in terms of Rule 5 is permissible only when there is a clearance of a final product of a manufacturer or of an intermediate product for export without payment of duty under a bond or letter of undertaking of a service provider, who provides an output service which is exported without payment of tax and by applying the format which is carved out with effect from 1 st April, 2012 by the substituted Rule 5.

30. Prior to such substitution, we have not seen anything in Rule 5 permitting refund of un-utilised credit. We are not dealing with a situation or case of a manufacturer or producer of final products seeks to claim Cenvat Credit of the duty paid on inputs lying in stock or in process when the manufactured or produced goods cease to be exempted goods or any goods become excisable (see Rule 3(2) of the Cenvat Credit Rules, 2004). Thus, refund of Cenvat Credit is permissible where any input is used for the final product which is cleared for export under bond or letter of undertaking, as the case may be, or used in the intermediate products cleared for export. In the scheme of the rules, therefore, what is sought by the assessee is not permissible. Thus, the attempt by the assessee to claim refund of un-utilised Cenvat Credit cannot be upheld. Merely because the inputs were lying un-utilised or were capable of being utilised, but the manufacturing activities came to a stand still on account of closure of the factory would not enable the assessee to claim refund of Cenvat Credit. That such credit can be availed of provided the inputs are used and not otherwise is clear from the scheme of the rules to which we have made a detailed reference in the foregoing paragraphs.

31. The sheet anchor of Mr.Patil's arguments is the judgment of the earlier Division Bench of this court and that is based on the view taken by the High Court of Karnataka. The High Court of Karnataka has not discussed the scheme of Cenvat Credit in details. The South Zonal Bench of the CESTAT in Slovak India (supra) considered the case of refund of un-utilised Cenvat Credit on account of closure of the factory of the said Slovak India. The Commissioner (Appeals) took the view that there is no provision in Rule 5 of the Cenvat Credit Rules to grant cash refund. After being approached, what the CESTAT observed is that there is a consistent view taken by the tribunal that such claim is eligible and the assessee can seek refund when it goes out of the Modvat scheme (predecessor of Cenvat) or the unit is closed. This is the reasoning in the tribunal's order and though the appeal of the Revenue before the High Court of Karnataka at Bengaluru raised several grounds and pleas, the High Court referred to the arguments and in para 4 of its order, reproduced Rule 5 of the Cenvat Credit Rules, 2002. In para 5, the reasoning of the High Court of Karnataka reads thus:-

"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 rules 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."

32. Thus, the High Court of Karnataka took the view that there is no express prohibition in terms of Rule 5 and that rule refers to a manufacturer. Thus, even if there is no manufacture in the light of the closure of the factory, the assessee being a manufacturer is construed as one coming out of the Modvat scheme but still eligible for cash refund. The factory is closed and the inputs were not used in the manufacture of a final product is, thus, overlooked. So long as the assessee is a manufacturer even if his factory is closed, the input credit was available, is thus the view.. Hence, the refund was held to be permissible.

33. When the matter was carried to the Hon'ble Supreme Court by the Revenue, the Hon'ble Supreme Court noted the concession of the learned Additional Solicitor General. That concession is that the views of the tribunals to the aforesaid effect have not been appealed against by the Revenue/Union of India. Pertinently, there is no concession by the Additional Solicitor General of India on the point of law. Hence, going by this concession on fact, the Special Leave Petition of the Revenue was dismissed. This, by no stretch of imagination, is a confirmation or approval of the view taken by the South Zonal Bench of the Tribunal at Bengaluru or the High Court of Karnataka.

34. Pertinently, when the matter was brought before this court in the case of Jain Venguard (supra), this court, relying upon the judgment in the case of Slovak India (supra) and the order in the Special Leave Petition, dismissed the Revenue's appeal. The aggrieved Revenue, carried the matter to the Hon'ble Supreme Court and the order passed on that Special Leave Petition reads as under:-

"Delay condoned.

We find no reason to interfere with the impugned order in exercise of our discretion under Article 136 of the Constitution. The Special Leave Petition is, accordingly, dismissed leaving the question of law open."

35. The Special Leave Petition was dismissed, but the question of law was expressly kept open. It is in these circumstances that we are not in agreement with Mr.Patil that the issue or the controversy before us stands concluded against the Revenue. The question of law was still open to be raised and equally examined by us. There is no question of judicial discipline in such matters. The counsel relied upon this principle of judicial discipline by inviting our attention to the judgment of the Hon'ble Rajasthan High Court in the case of Welcure Drugs and Pharmaceuticals Ltd. vs. Commissioner of Central Excise, Jaipur reported in 2018 (15) GST Law Times Page 257. There, the Hon'ble Rajasthan High Court concluded that the Revenue cannot seek to urge before that High Court that the view taken by four different High Courts approving the order of CESTAT has lost its persuasive value, particularly when the Special Leave Petitions against the view taken by four different High Courts were either not filed or filed but not entertained. Thus, the tribunals have taken a consistent view and the Revenue could not succeed in having that set aside. It is in these circumstances, the Rajasthan High Court negatived the contention of the Revenue that the tribunal under the jurisdiction of that High Court could have distinguished the orders and judgments of its Benches. That was found to be contrary to the judicial discipline. It is in these circumstances so also when there was a larger Bench view of the tribunal having a binding effect, that the principle of judicial discipline was pressed into service.

36. After the view taken in Steel Strips Ltd. (supra) and which was also fairly brought to our notice, it is evident that this principle has no application to the facts and circumstances before us.

37. Finally, we do not find any merit in the arguments of Mr.Patil to the effect that if the earlier judgment is not appealed against, an appeal against the subsequent order or judgment passed relying upon the earlier judgment cannot be sustained. He pressed into service the judgment of the Hon'ble Supreme Court in the case of Birla Corporation Ltd. vs. Commissioner of Central Excise9. There, the issue was entirely different. The issue was whether the duty paid on spares of rope way used for the purpose of transporting

the crushed limestone from the mines located 4.2 kilometer away to the factory is entitled to Modvat Credit. That was disallowed on the ground that rope way transports raw material from the mines to the factory premises and is not a material handling equipment within the factory premises. It was not disputed that the crushed limestone is brought from the mines to the factory premises where it is deposited utilising the rope way as a means of transportation.

38. An identical issue came up for consideration in the case of J.K. Udaipur Udyog Limited vs. Commissioner of Central Excise 10. In that case, the tribunal followed the principles laid down in its prior decision and held that the Modvat Credit was admissible. A civil appeal was preferred to the Hon'ble Supreme Court, but that was dismissed as not pressed. That is because the judgment relied upon by the tribunal in the case of J.K. Udaipur Udyog Limited (supra) and the Commissioner of Central Excise, Chennai was accepted by the Chief Commissioner of Central Excise, Chennai. In these circumstances, the Special Leave Petition by Birla Corporation Limited came to be allowed. The Hon'ble Supreme Court held that when same question arises for consideration, the facts are almost identical, then, the Revenue cannot be permitted to take a different stand. More so, when the earlier appeal involving identical issue was not pressed and therefore, dismissed. Hence, a contrary stand cannot be taken and that will confuse everybody. This judgment, therefore, has no application to the issue before us.

39. The referring order has already discussed in detail as to how the principle of merger cannot be invoked in the case of Jain Vanguard (supra), the question of law was expressly kept open. Hence, the earlier view of the tribunal does not merge with dismissal of the Special Leave Petition in the case of Slovak India (supra). Hence, this principle has also no application.

40. As a result of the above discussion, we answer the questions of law framed above as (a) and (b) in the negative. They have to be answered against the assessee and in favour of the Revenue. Questions (a) and (b) having been answered accordingly, needless to state that the order of the Hon'ble Supreme Court in the case of Slovak India (supra) cannot be read as a declaration of law under Article 141 of the Constitution of India.

13.1 Hence, in light of the above interpretation of the legal provisions given by the Larger Bench of the Hon'ble High Court, it becomes crystal clear that the appellant is not entitled for the refund of unutilized CENVAT Credit on account of the closure of the business/unit. Further, the case of *Slovak India* relied upon by the appellant is distinguished as the Hon'ble High Court's above mentioned finding that it can't be read *as a declaration of law under Article 141 of the Constitution of India.*

14. In view of the above, impugned OIO is upheld and appeal filed by the appellant is rejected.

15. The appeals filed by the appellant stand disposed off in above terms.

20th September, 2019.

(Akhilesh Kumar)

Commissioner (Appeals)

Attested

(M.P.Sisodiya.)
Superintendent (Appeals)
Central GST, Ahmedabad.

By Regd. Post A. D

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Copy to :

1. The Pr. Chief Commissioner, CGST and Central Excise, Ahmedabad.
2. The Commissioner CGST and Central Excise, Ahmedabad-South.
3. The Deputy /Asstt. Commissioner, Central Excise, Division-VI, Ahmedabad-South.
4. The Deputy/Asstt. Commissioner (Systems), Central Excise, Ahmedabad-South.
5. Guard file
6. PA File