REGISTERED
SPEED POST

F.No. 198/114-A/2015-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
(REVISION APPLICATION UNIT)

14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHIKAJI CAMA PLACE,
NEW DELHI-110 066

Date of Issue 19/4/16.

ORDER NO. 56/2016-CX DATED 18.04.2016 OF THE GOVERNMENT OF INDIA, PASSED BY SMT. RIMJHIM PRASAD, JOINT SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35 EE OF THE CENTRAL EXCISE ACT, 1944.

Subject : Revision Application filed, Under Section 35 EE of the Central Excise Act, 1944 against the Order-in-Appeal No.64-2014(G)CE dated 29.10.2014, passed by the Commissioner (Appeals), Central Excise, Guntur.

Applicant : Commissioner of Customs, Central Excise & Service Tax, Guntur

Respondent : M/s Blue Whale Industries, Guntur

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ORDER

This Revision Application has been filed by the Commissioner of Central Excise & Customs, Guntur (hereinafter referred to as the Department) against the Order-in-Appeal No.64-2014(G)CE dated 29.10.2014, passed by the Commissioner (Appeals), Customs, Central Excise & Service Tax, Guntur with respect to Order-in-Original No.62/2014-R(CE) dated 02.07.2014 passed by the Assistant Commissioner of Customs, Central Excise & Service Tax, Guntur Division. M/s Blue Whale Industries, Guntur is the respondent in this case.

2. The respondents are the manufacturers of goods viz. Indian Mouth Freshner falling under chapter Sub-Heading No.21069020 of the Central Excise Tariff Act 1985 and exporting the same. The respondents are availing the facility of Cenvat credit under the Cenvat Credit Rules, 2004. The respondents filed a refund claim of Rs.2,57,77,440/- in terms of Rule 5 of the Cenvat Credit Rules, 2004 being the accumulated Cenvat Credit attributable to the inputs used in the manufacture of finished goods exported during the quarter ending December 2013. The lower authorities observed that the present claim of Rs.2,57,77,440/- also includes the credit amount of Rs.1,44,10,817/- transferred from their old unit at Vasai to present unit at Guntur and a show cause notice dated 18.06.2014 was issued to the respondents asking them as to why the refund claimed by them should not be disallowed to the extent of Rs.1,44,10,817/- as the said amount is found to be irregularly availed credit on account of transfer of their old unit from Vasai to Guntur. After following due process of law, the adjudicating authority passed the impugned Order-in-Original dated 02.07.2014, wherein the refund claim amounting to Rs.1,44,16,817/- was rejected on the ground that the respondents have taken the said amount as irregular cenvat credit under Rule 10 of the Cenvat Credit Rules, 2004 on account of transfer of their unit from Vasai to Guntur.

3. Being aggrieved by the said Order-in-Original, respondent filed appeal before Commissioner (Appeals), Customs, Central Excise & Service Tax, Guntur, who decided the case in favour of respondent in the absence of any confirmed demand of Rs.1,44,10,817/- on the grounds of violation of Rule 10 of Cenvat Credit Rules,2004.

4. Subsequently, Writ Petition No.28868 of 2015 has been filed by the respondent in the High Court of Telangana and Andhra Pradesh at Hyderabad making a prayer that the original authority may be directed to grant refund pursuant to the impugned Order-in-Appeal, which is in their favour. Another issue for consideration before the Hon'ble High Court was whether a revision application had been filed by the Department or not. The Hon'ble High Court disposed off the above said Writ Petition vide Order dated 07.01.2016 (received in the Revision Application Unit on 23.02.2016 from the Dispatch Assistant, High Court of Telangana and Andhra Pradesh) with direction to the first respondent, viz. Union of India through Joint Secretary (Revision

Application) to decide the pending Revision Application within two months from the date of receipt of a copy of this order and also directing that the observation if any made with regard to limitation will have no bearing on disposal of Revision Application and to decide the Revision Application, if it is otherwise in order uninfluenced by any of the observations herein above.

5. The Department has filed this revision application under Section 35 EE of Central Excise Act, 1944 before Central Government on the following grounds:

5.1 A letter vide C.No.V/5/8/2012-Tech., dated 06.12.2013., was sent to the Deputy Commissioner, Vasai Division by the JAC, Guntur Division calling for a report on the transfer of the unit from Vasai to Guntur. The Deputy Commissioner of Customs, Central Excise and Servlce Tax, Vasai Division, Thane-II vide his letter in F.No.C.EX/Vasai/R-03/Blue Whale/2013/1171, dated 20.12.2013, stated that the ER-1 return submitted by the assessee for the month of October, 2012 shows clearance of 33826 Nos. of Indian Mouth Freshner (PM) valued at Rs.2,72,29,930/- and 1873 Nos. of parts of Electro Mechanical Devices valued at Rs.42,14,250/- to their Guntur Unit. Also, total credit balance of Rs.1,44,10,817/- was lying as balance in their Cenvat Credit Account.

5.2 With regard to details of stock at the time of shifting of the said unit, the Deputy Commissioner stated that M/s.Blue Whale Industries, 113, Geeta Udyog Nagar, Building No.3, Valiv Road, Vasai Road (East), Thane-401 205 vide their letter dated 17.09.2012 while informing above the proposed shifting of their unit from Vasai to Guntur had informed that:

(i) They have obtained a new Central Excise Registration ECC No. AAHFB7252LEM002 at Guntur.

(ii) They will be shifting finished goods lying in their Vasai Unit under Rule 10 of the Credit Rules, without discharging the duty.

(iii) They shall account for the finished goods lying in Vasai Unit and transferred to Guntur Unit in their Daily Stock Register at Guntur. Thereafter, they shall request Central Excise Authorities at Guntur to verify physical receipt of the material, if they so desire and send a copy of such verification report to Vasai Divisional Office. If no verification is conducted at Guntur by the Central Excise Authorities, they shall send a self attested Xerox copy of their Daily Stock Register.

(iv) In their letter they had not submitted the details of stock, lying in Vasai Unit nor the amount of credit balance which they intended to transfer nor the worksheet of the Cenvat Credit attributable to the Stock of Finished goods intended to be transferred from Vasai Unit to Guntur.

(v) No permission is required from the Vasai Division Office for shifting/transferring the credit to their Guntur Unit.

The Deputy Commissioner also stated that:

I. While receiving the said letter on 17.09.2012 of M/s.Blue Whale Industries, Vasai were asked to furnish copy of stock statement submitted to the Bank for the period from June, 2012 to 17.09.2012 and also to furnish copy of stock register for the period from June, 2012 to 17.09.2012. However, the same was not submitted by them.

II. Subsequently, M/s. Blue Whale Industries vide their letter dated 03.12.2012 addressed to them, informed that:

(i) They have shifted their unit to Guntur under Rule 10 of the Cenvat Credit Rules, 2004.

(ii) They intend to utilize credit balance of Rs.1,44,10,817/- lying unutilized at Vasai and post transfer to Guntur still lying in the books of account.

III. Presently, the unit is not functional at the address viz., 113, Geeta Udyog Nagar, Building No.3, Valiv Road, Vasai Road (East), Thane-401 205.

5.3 Meanwhile, M/s. Blue Whale Industries, Perecherla, Guntur (AP), vide their letter dated 14.11.2013 have informed the Assistant Commissioner, Guntur Division that they have raised a credit entry of Rs.1,44,10,817/- (Cenvat Credit-RG 23A Part-II] & Rs.34,572/- (PLA) stating that they have concluded that there is substantial compliance of Rule 10(3) of the Credit Rules. The assesse have also reflected the same in their ER-1 Return filed for the month of November, 2013 as well.

5.4 As per the Rule 10 (1) of the Credit Rules, if a manufacturer of the final products shifts his factory to another site or the factory is transferred on account of change in ownership or on account of sale, merger, amalgamation, lease or transfer of the factory to a joint venture with the specific provision of transfer of liabilities of such factor, then the manufacturer shall be allowed to transfer the Cenvat Credit lying unutilized in his accounts to such transferred, sold, merged, leased or amalgamated factory. The assesses have not complied with the provisions of the said Rule. The assesses have not procured/produced any clearance certificate / fact statement regarding their Central Excise credits/liabilities/plant & machinery/raw material/semi finished goods/finished goods from the jurisdictional central Excise Authorities of Vasai Division, Maharashtra, thereby contravening the provisions of Rule 10 (1) of the Credit Rules.

5.5 Further, it was verified from the CBEC's verification site as on 30.10.2014, the registration CER NO.AAHFB7252LXM001 obtained by the assessee at Range-III, Vasai Division, Thane-II Commissionerate, Maharashtra, has not been cancelled. It is also a

fact that the. Range Office, Range-III, Vasai vide his letter dated 28.03.2014 has informed the JAC Guntur that a SCN was issued to the unit by the Additional Commissioner, Thane-II Commissionerate demanding an amount of Rs.14,02,778/ - for irregular availment of cenvat credit and the same is pending adjudication.

5.6 As per Rule 10 (3) of the Credit Rules, the transfer of the Cenvat Credit under sub-rule (1) shall be allowed only if the stock of inputs as such or in process, or the capital goods is also transferred along with the factory or business premises to the new site or ownership and the inputs, or capital goods, on which credit has been availed of are duly accounted for to the satisfaction of the Deputy Commissioner of Centyral Excise or, as the case may be, the Assistant Commissioner of Central Excise. In this regard, the assessee should have produced documentary evidence from the jurisdictional Central Excise Authorities on their eligibility to transfer the said credits of Rs.1,44,10,817/- (Cenvat Credit-RG 23A Part-II) & Rs,34,572/- (PLA) from their unit located at Vasai Division to their unit located at Perecherla, Guntur District (AP). The assessee have got the approval/permission to transfer the said credits of Rs.1,44,10,817/- (Cenvat Credit - RG 23A Part-II] & Rs.34,572/- (PLA) neither from the jurisdictional Deputy Commissioner, Customs & Central Excise, Vasai Division, nor from the jurisdictional Assistant Commissioner, Customs & Central Excise, Guntur Division but have availed the said credits sue motto and thus, contravened the provisions of Rule 10 (3) of the Credit Rules and thus have suppressed the facts.

5.7 The relevant provision under which the refund claimed is Rule 5 of credit Rules which is reproduced hereunder:

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:

5.8 In view of the above narrated developments, the respondent's Unit has not been transferred by following the procedures prescribed under Rule 10 of CCR, but have

availed the credit in question suo moto, by even suppressing the information as called for by the Department at both ends. In fact, the JAC in his Show Cause Notice dated 18.06.2014 issued to the appeallant has asked them to Show Cause as to why the said refund claim of Rs.2,57,77,440/- should not be restricted by disallowing an amount of Rs.1,44,10,817/- which appeared to be irregularly availed credit. Thus, the denial of a part of the refund claim by the Original Adjudicating Authority is legally correct. However, the demand under Section 11A has also been issued on 11.11.2014 by the Commissioner, Guntur.

5.9 As such the violations made by the asseessee in availing the said credit have been mentioned in the Show Cause Notice issued by the JAC. The JAC on 21.10.2014 has informed the Appellate Authority that the issuance of the SCN by the Commissioner is under process. It is imperative to mention that the demand ultimately raised well within the time frame of Section 11A and the timing of issuance of will not vitiate the proceedings. Hence it is clear that the a part of amount of refund claimed by the respondent has been denied for the procedural violation of Rule 10 of CCR, by giving them an opportunity to Show Cause also, but not on assumptions and presumptions. When Rules or Provisions seek mandatory or complete compliance, the claim of the assessee that they have made substantial compliance of Rule 10(3) of CCR, will not meet the requirement of Law as per the Supreme Court Judgement in case of Commissioner of Central Excise., New Delhi Versus Hari Chand Shri Gopal reported in 2010 (260) E.L.T. 3 (S.C.).

5.10 Since a demand has already been raised for the irregular availment of credit, the question of payment of this disputed credit by way of refund does not arise. Only in the case, the assessee proves that there was no irregular availment of credit then only the question of consideration of refund arises.

6. A show cause notice was issued to the respondent party under Section 35EE of the Central Excise Act 1944 to file counter reply who vide their reply dated 10.03.2015 mainly stated as under:

6.1 A Revision Application under Section 35EE of the Central Excise Act, 1944 is required to be filed within 3 months from the date of the communication of the order against which the Revision Application was being made. A Revision Application may be allowed to be presented within a further period of 3 months if the Revisionary Authority was satisfied that the applicant was prevented by sufficient cause from presenting the application within the prescribed period of 3 months. Thus, the statutory scheme of Section 35EE of the Act is that a Revision Application has to be filed within 3 months of the communication of the order to be challenged, and delay of further 3 months could be condoned by the Revisionary Authority. But if a period of 6 months passed by and revision application was not filed within such total period of 6 months, then a Revision Application cannot be filed thereafter. A similar provision is made by the Legislature

under Section 35 of the said Act for filing appeal before the Commissioner (Appeals). An appeal before the Commissioner (Appeals) is required to be filed within 60 days from the date of communication of the concerned order, and the Commissioner (Appeals) is vested with power to condone delay of 30 days if the appellant was prevented by sufficient cause from presenting the appeal within the specified period of 60 days.

6.2 The Hon'ble Supreme Court has held in case of Singh Enterprises Vs Commissioner, Jamshedpur 2008 (221) ELT 163 (SC) that the proviso to Sub Section (1) of Section 35 makes the position crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days, and the language used makes the position clear that the Legislature intended the appellate authority to entertain the appeal by condoning delay only upto 30 days after the expiry of 60 days which is the normal period for preferring appeal. The Hon'ble Supreme Court has also held in para 8 of this judgment that there was complete exclusion of Section 5 of the Limitation Act, and there was no power to condone delay after the expiry of 30 days period.

6.3 We submit that the same principle is applicable with regard to the scheme of Section 35EE also, because the language of Section 35EE (2) and the proviso thereunder is similar to the language and scheme of Section 35(1) of the Central Excise Act. The proviso to Section 35EE(2) makes the position clear that the Legislature intended the Revisionary Authority to entertain a Revision Application by condoning the delay only upto 3 months after the expiry of specified period of 3 months which was the normal period for preferring a Revision Application. The provisions of the Limitation Act are not applicable even in case, of a Revision Application, and therefore there is no power to condone the delay after a total period of 6 months from the date of communication of the order against which a Revision Application is being made.

6.4 If the condonable period of limitation was over, then no appeal could be preferred under the Act, and the only remedy available to the aggrieved person is a Writ Petition before a High Court under Article 226 of the Constitution of India. Recently, in case of Panoli Intermediate (India) Pvt. Ltd. Vs. UOI, a Larger Bench of the Hon'ble Gujarat High Court has, in judgment reported at 2015 (326) ELT 532 (Guj.), held that the limitation provided under Section 35 of the Act cannot be condoned in filing the appeal beyond the period of 30 days as provided under the proviso to Section 35(1), nor could the appeal be filed beyond the period of 90 days. The Hon'ble High Court has also held that even a petition under Article 226 of the Constitution would not lie for the purpose of condonation of delay in filing the appeal; and it is further held by the Larger Bench of the Hon'ble High Court that a petition under Article 226 of the Constitution of India could be preferred for challenging the order passed by the original adjudicating authority on merits, but in limited circumstances.

6.5 We have claimed refund under Rule 5 of the Cenvat Credit Rules for a total sum of Rs. 2,57,77,440/-, and on this refund claim lodged on 24.04.2014, a Show Cause Notice dated 18.06.2014 was served upon us thereby proposing to reject the refund claim to the extent of Rs.1,44,10,817/-. On this show cause notice, an OIO No.62/2014(R) (CE) dated 02.07.2014 was passed by the Assistant Commissioner of Central Excise, Guntur, who sanctioned refund claim to the extent of Rs.1,13,66,623/- in cash, and rejected the remaining claim for Rs.1,44,10,817/- on the grounds that a Draft Show Cause Notice for denial of the credit of the above amount was submitted to the Commissioner for the consideration vide letter No.C.No.V/21/15/32/2014-Adj. dated 26.06.2014; because such credit was allegedly found irregular, that grant of refund may not be proper when draft proceedings for alleged irregular availment of credit were under consideration, that transfer of credit under Rule 10 of the Cenvat Credit Rules was not like payment of duty on consignment-wise basis and was not related to the quantum or price of the goods transferred; and the issues relating to merits of the eligibility of such credit were not the subject matter of the case, but refund claim to the extent of Rs.1,13,66,623/- was pre-audited and approved by the office of the Commissioner, Guntur, and accordingly refund of such amount was allowed.

6.6 Thus, the Assistant Commissioner had held, and rightly so, that the issue about the merits of our eligibility for credit of Rs.1,44,10,817/- transferred from our Vasai Unit to our new unit at Perecherla in Guntur District was, not the subject matter of the case before him; but the claim for such unutilized credit was rejected only because a Draft Show Cause Notice was submitted to the Commissioner for consideration vide letter dated 26.06.2014 (supra) for such credit by the Commissioner of Central Excise, Guntur and that pre-audit and approval for sanction were communicated and allowed by the Commissioner's office for the claim of Rs.1,13,66,623/- only. These were the only issues raised by the Assistant Commissioner for rejecting our refund claim of Rs.1,44,10,817/.

6.7 The Commissioner (Appeals), however, found that the above grounds were not germane nor relevant for deciding a refund claim lodged under Rule 5 of the Cenvat Credit Rules, and accordingly our appeal is allowed by the Commissioner (Appeals). But a perusal of the Revision Application now filed by the Revenue shows that totally new grounds are raised in the Application though no such grounds were considered or decided by the Assistant Commissioner while rejecting our refund claim or even by the Commissioner (Appeals) while allowing our appeal.

6.8 Three grounds are raised in the Revenue's Application which are, (i) that transfer of Cenvat Credit was permissible while transferring a factory to another site with a specific provision for transfer of liabilities of said factory but we had not complied with the provisions of Rule 10 of the Cenvat Credit Rules laying down the above condition inasmuch as we have not obtained any clearance certificate or fact

statement from the jurisdictional Central Excise authorities of Vasai Division, Maharashtra, regarding Central Excise credits/liabilities/plant and machinery/raw materials/semi-finished goods/finished goods in this case; (ii) that our Central Excise registration for Thane factory has not been surrendered and therefore there was contravention of the provisions of Rule 9 of the Central Excise Rules, 2002; and (iii) that though Rule 10 of the Cenvat Credit Rules refers to the satisfaction of the Deputy/Assistant Commissioner of Central Excise regarding transfer of stock of inputs as such or in process or the capital goods along with the factory or business premises to the new site, we had not got any approval/permission to transfer Cenvat credit as well as PLA balance from the jurisdictional officers of Vasai Division or from such officers of Guntur Division, and the credits were availed suo-moto.

6.9 But, none of these three grounds raised in the Revenue's Application was considered by the Assistant Commissioner and the Commissioner (Appeals), whereas our refund claim for Rs.1,44,10,817/- was rejected on totally different grounds like Draft proposal to issue a Show Cause Notice by the Commissioner for alleged irregular transfer of this Cenvat credit of Rs.1,44,10,817/- and pre-audit and approval having been allowed by the Commissioner's office only for the remaining claim of Rs.1,13,66,623/-. But these grounds on which the Assistant Commissioner had rejected our refund claim for which we filed appeal before the Commissioner (Appeals) are not raised in the Revenue's Application now filed before the Hon'ble Revisionary Authority. On the other hand, totally new grounds are raised in the Application, which is not permissible in law.

6.10 The respondent further made various submission with regard to merits of the case as under:

6.10.1 Cenvat credit lying unutilized in one factory is a substantive right of the manufacturer when the factory is shifted to another site with inputs, capital goods and such Cenvat Credit. We also submit that there is no permission that a manufacturer requires from the Central Excise officers for transfer and availment of Cenvat Credit when his factory was shifted to another site because Rule 10 only provides that the manufacturer shall be allowed to transfer the Cenvat Credit lying unutilized in his accounts to such transferred factory. We have also caused enquiry in other Divisions and Commissionerates and we have learnt that there is no practice anywhere for applying for a permission or obtaining a permission for transferring unutilized Cenvat Credit when a factory was shifted by a manufacturer to another site with inputs, capital goods etc. We therefore request you to consider this position, and also to consider that Rule 10 of the Cenvat Rules does not specifically require a permission for transfer of Cenvat Credit when stocks of inputs and capital goods etc. were shifted to the new site while transferring unutilized Cenvat credit.

6.10.2 In the above premises, we submit that none of the objections raised in the Revenue's Application in respect of transfer of unutilized Cenvat Credit of

Rs.1,44,10,817/- are sustainable in facts as well as in law, and therefore all these objections deserve to be rejected at once in the interest of justice.

6.10.3 In this view of the matter, we request you to reject the Revenue's Revision Application.

7. In compliance of Hon'ble High Court's Order, personal hearing was scheduled in this case on 21.03.2016.

7.1 Shri Ratna Kishore, Assistant Commissioner, Guntur appeared on behalf of the Department who stated that Cenvat Credit has been incorrectly availed, for which Show Cause Notice has been issued and is pending adjudication. Therefore, refund of disputed amount cannot be allowed. He reiterated grounds of revision application.

7.2 Shri Venkat Chari, Chartered Accountant appeared for hearing on behalf of respondent and mainly reiterated contents of the written submission dated 15.03.2016. He laid emphasis on the point that the Revision Application is itself time barred and needs to be dismissed as such. Even on merits refund is admissible to them as it is not the jurisdiction of the Revisionary Authority to decide issue raised in the Show Cause Notice which is in any case pending adjudication.

7.3 The department vide their FAX, received in this Office on 29.03.2016 forwarded dispatch particulars of revision application sent by registered post sent on 16.01.2015 vide registered letter along with acknowledgement due from Guntur Post Office bearing No.RN610846349IN and letter No.522004-00308 dated 27.11.2015 of Department of Posts, Guntur intimating the Superintendent (Technical), Guntur Commissionerate that the article with above number has been delivered on 22.01.2015.

8. Government has carefully gone through the relevant case records, written/oral submission and the impugned Order-in-Original and Order-in-Appeal.

9. Upon perusal of records, Government observes that the respondent filed a refund claim of Rs. 2,57,77,440/- under Rule 5 of the Cenvat Credit Rules, 2004. The lower authorities observed that this amount included the credit amount of Rs.1,44,10,817/- transferred from their old unit at Vasai to present unit at Guntur under Rule 10 of the Cenvat Credit Rules and a Show Cause Notice dated 18.06.2014 was issued to the respondents asking them as to why the refund claimed by them should not be disallowed to the extent of Rs.1,44,10,817/- as the said amount is found to be irregularly availed credit on account of transfer of their old unit at Vasai to Guntur. After following due process of law, the adjudicating authority passed the impugned Order-in-Original dated 02.07.2014, wherein he rejected the refund claim amounting to Rs.1,44,16,817/- on the ground that the respondents have taken the said amount as Cenvat Credit irregularly under Rule 10 of the Cenvat Credit Rules, 2004.

The Commissioner (Appeals) decided the case in favour of respondent as there was no confirmed demand of Rs. 1,44,16,817/- against the respondent for violation of Rule 10 of the Cenvat Credit Rules. Now the Department has filed this Revision Application under Section 35EE of the Central Excise Act, 1944 before the Central Government on grounds mentioned in para 4 above.

10. Government further observes that a Writ Petition No.28868 of 2015 was filed by the respondent before the Hon'ble High Court of Telangana and Andhra Pradesh making a prayer that the original authority may be directed to grant refund pursuant to impugned Order-in-Appeal, which is in their favour. In response, the Department pleaded that they have filed revision application against the impugned Order-in-Appeal under Section 35EE of the Central Excise Act, 1944. In the proceedings before the Hon'ble High Court, it emerged that no revision application dated 13.01.2015 as dispatched on 16.01.2015 was received by Revision Application Unit in the month of January as it was sent to a wrong address but a copy was received from the applicant subsequently after their being informed that no such revision application is seen to have been received. The Hon'ble High Court disposed off the above said Writ Petition with direction to Revisionary Authority to decide the Revision Application within two months from the date of receipt of a copy of the order if it is otherwise in order and uninfluenced by any of the observations made thereinabove.

11. Government first proceeds to examine the issue of the limitation raised by the respondent. In this regard, Hon'ble High Court in its judgement in the following relevant paras has discussed the issue of limitation as under:-

"Even in those circumstances, the Kerala High Court held that filing of a Revision is within time since it was remitted by the Appellate Collector of Customs, Kochin to the Revisional Authority. Persuaded by the principle laid down in Ruby Rubber Works, we are of the prime-facie view that the Revision is filed within time; however, it is for the Revisional Authority to decide the limitation with reference to Section 35EE(2) of the Act. Therefore, we do not wish to express any opinion at this stage about the limitation.

One of the contentions of the petitioners is that the 1st respondent has no authority to condone the delay beyond three months under Section 35EE(2) of the Act. No doubt, the power conferred on the 1st respondent is limited. However, when the application was sent to the wrong address due to the misdirection of the Appellate Commissioner and the Committee of Commissioners, such filing of Revision cannot be said to be barred by limitation prima-facie and when it is filed within time, as directed by the committee of Commissioners and suggested by the Commissioner of Appeals, the same could have been considered by the 1st respondent as a good ground to entertain the Revision.

The jurisdiction under Article 226 of the Constitution is discretionary and such discretion must be exercised judiciously, taking into consideration all the attending circumstances. In the present facts of the case, as directed by the Appellate Commissioner and Committee of Commissioners, the Revision was sent to the Joint Secretary, Government of India, Ministry of

Finance and Company Affairs, Department of Revenue, Jeevan Deep Building, Sansad Marg, New Delhi but the office address of the Joint Secretary (Revision Jurisdiction) Ministry of Finance, 14 Hudco Vishal Buildings, Bhikhaji Cama Palace, New Delhi was not repeated in the address given in the orders referred above. Curiously, the grounds of Revision and other documents sent along with the Revision were neither returned nor forwarded to the correct address but only after consistent consultation by letter correspondence, the Department could know shifting of the office even prior to sending the Revision along with the documents to the address given in the orders passed by the Appellate Commissioner and Committee of Commissioners directing the 2nd respondent to file a Revision; till then, the respondents are not aware about the change in the address of the office of the Joint Secretary. In those circumstances, to avoid loss to any one of the parties to this Writ Petition, we find that it is a fit case to direct the 1st respondent to dispose of the Appeal pending before them, as expeditiously as possible, in any event not later than two months from the date of receipt of a copy of this order, by exercising an equitable jurisdiction conferred on this Court under Article 226 of the Constitution.

The observations, if any, made with regard to the limitation will have no bearing on disposal of the Revision, pending before the 1st respondent, and the 1st respondent is requested to decide the Revision, if it is otherwise in order, uninfluenced by any of the observations made hereinabove, as expeditiously as possible, in any event not later than two months from the date of receipt of a copy of this order."

11.1 Government observes that the time limit for filing Revision Application has been specified in Section 35EE(2) of the Central Excise Act, 1944 as under:

> *" (2) An application under sub-Section (1) shall be made within three months from the date of the communication to the applicant of the order against which the application is being made:*
>
> ***Provided*** *that the Central Government may, if it is satisfied that applicant was prevented by sufficient cause from presenting the application within the aforesaid period of three months, allow it to be presented within a further period of three months."*

From a plain reading of the above provisions, it is clear that a Revision Application is to be filed within three months of the date of the communication of the order of the Commissioner (Appeals) and the Government may allow the filing of the application after a further period of three months if sufficient cause exists.

11.2 Government now proceeds to examine the facts of the case in terms of the directions of the Hon'ble High Court to decide the issue of limitation with reference to Section 35EE of the Act. Government notes that it is an established fact on record that the Revision Application against the impugned Order-in-Appeal dated 29.10.2014 (received on 30.10.2014) was dispatched by registered speed post on 16.01.2015 through Guntur Post Office bearing No.RN61084634 to an address as mentioned in preamble to the impugned Order-in-Appeal and in the authorization to file appeal. The Department of Posts, Guntur vide their letter No.522004-00308 dated 27.11.2015 intimated the applicant Department that the said revision application dispatched on 16.01.2015 with above transaction number has been delivered on 22.01.2015. It is

also a fact on record that the said revision application was not sent to the address where office of Revision Application is currently located, as also observed by the Hon'ble High Court. Neither was it returned nor forwarded to the correct address. Further, the office of Revision Application informed the Department on 13.10.2015 in response to their request for early hearing in the revision petition filed by them that no such Revision Application had been received at the present address, whereafter they sent a copy.

11.3 From the above, it emerges that it is not a case that no Revision Application has been filed in terms of Section 35EE of the Central Excise Act, 1944 but that it has been sent at the wrong address. In para 2 of page 9 of Hon'ble High Court's judgement, it has been stated that if the Revision Application has been sent to wrong address due to mis-direction of Appellate Commissioner and the Committee of Commissioners, the same cannot be said to be barred by limitation and when it is filed within time as directed by Committee of Commissioners the same could have been considered as a good ground to entertain the Revision by the Revisionary Authority. As such the Government observes that the Revision Application was filed on 22.01.2015 i.e. the date on which it was delivered at previous address of Revisionary Authority.

11.4 In this regard, Government finds support in the decision of the Hon'ble CESTAT in the case of Kanishk Steel Industries Ltd. 2005 (191) ELT 231 (Tri.-Chennai) where in a similar situation, an appeal was sent by Speed Post to the Registry of the bench but nothing was heard from the Registry in relation to that appeal. Later on when a connected appeal arose before the Bench, the matter came to light that it was not received by the Registry. The Tribunal based on the Speed Post receipt which indicates that some postal article having been delivered to the Assistant Registrar, condoned the delay.

11.5 Government has also perused the decision of the Hon'ble Kerala High Court in the case of Ruby Rubber Works Ltd vs. Assistant Collector of Central Excise I.D.O Kottayam and others 1980 (6) ELT 615 (Kerala) and draws heavily from it as its ratio is squarely applicable to the present case. Needless to mention that even the Hon'ble High Court of Telangana and Andhra Pradesh in the context of the present case is persuaded by the principle laid down in the case of Ruby Rubber Works. The Hon'ble Kerala High Court therein has dealt with a case where the order was appealed against within time, although on account of a wrong address, the memorandum of appeal did not reach the office of the Appellate Collector and held that even assuming that the petitioner's appeal was ultimately received by the appellate authority outside the period of limitation, in view of the fact that if the appeal had not been wrongly addressed, it would in all probability reached the appellate authority well within time. The appeal was restored back to the file of the appellate authority to be disposed off on merits.

11.6 Government therefore, notes that as emerges from the preceding paragraphs, the present application has been filed within a period of three months from the relevant date even though it was sent to the wrong address due to the misdirection of the Appellate Commissioner and Committee of Commissioners. If the application had not been wrongly addressed, it would have reached the Revision Application Unit at the correct address well within time as it reached the address to which it was sent as per the postal authorities.

11.7 In view of the above discussion, Government holds that the revision application has been filed within time under Section 35EE of the Central Excise Act, 1944 and question of being hit by limitation does not arise.

12. Government now proceeds to examine the issue involved in this case. It is observed that the main issue in the present case is admissibility of refund of accumulated Cenvat Credit under Rule 5 of Cenvat Credit Rules, 2004.

12.1. Government observes that Section 35 EE of Central Excise Act, 1944 states that *"(1) The Central Government may, on the application of any person aggrieved by any order passed under Section 35A, where the order is of the nature referred to in the first proviso to sub-section (1) of Section 35 B, annul or modify such order:*

> *[Provided that the Central Government may in its discretion, refuse to admit an application in respect of an order where the amount of duty or fine or penalty, determined by such order does not exceed five thousand rupees]*
>
> .....
>
> *[(1A) The Principal Commissioner of Central Excise or Commissioner of Central Excise as the case may be, if he is of the opinion that an order passed by the Commissioner (Appeals) under section 35A is not legal or proper, direct the proper officer to make an application on his behalf to the Central Government for revision of such order.]"*

Further, sub-section (1) of Section 35 B of Central Excise Act, 1944 reads as under:-

(1) Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order -

- *(a) a decision or order passed by the Commissioner of Central Excise as an adjudicating authority;*
- *(b) an order passed by the Commissioner (Appeals) under Section 35A;*
- *(c) an order passed by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) (hereafter in this Chapter referred to as the Board) or the Appellate Commissioner of Central Excise under Section 35, as it stood immediately before the appointed day;*
- *(d) an order passed by the Board or the Commissioner of Central Excise either before or after the appointed day, under Section 35A, as it stood immediately before that day:*

Provided that no appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b) if such order relates to –

(a) a case of loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory, or from one warehouse to another, or during the course of processing of the goods in a warehouse or in storage, whether in a factory or in a warehouse;

(b) a rebate of duty of excise on goods exported to any country or territory outside India or on excisable materials used in the manufacture of goods which are exported to any country or territory outside India;

(c) goods exported outside India (except to Nepal or Bhutan) without payment of duty ;

**(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 thereunder and such order is passed by the Commissioner (Appeals) on or after the date appointed under section 109 of the Finance (No. 2) Act, 1998.*

**To be inserted from a date to be notified by Section 109 of the Finance (No.2) At, 1998 (21 of 1998).*

12.2. Government observes that under Section 35 EE of the Central Excise Act, 1944, a Revision Application against the Order of Commissioner (Appeals) passed under Section 35 A ibid lies with Government only if such orders relate to cases as mentioned in the proviso to sub-section (1) of Section 35(B) of the Act. As the issue covered in this Revision Application relates to refund of unutilized credit under Rule 5 of Cenvat Credit Rules 2004, the subject matter is not covered in the first proviso to sub-section (1) of Section 35 B of the Central Excise Act 1944. Therefore, Revision Application on this issue does not lie before Central Government under Section 35 EE of the Central Excise Act, 1944.

12.3. Further, Government observes that the Department as in the authorization to file Revision Application under Section 35EE(2) has erred in considering the issue as a case of rebate of duty. It is only when duty is leviable at the time of export and duty is actually paid before export that question of rebate of duty on goods exported can be raised under Rule 18 of the Central Excise Rules, 2002. Coming to Rule 5 of Cenvat Credit Rules, 2004 read with Notification No.27/2012 CE (NT) dated 18.06.2012, it is seen that the same refers to claim of refund of credit of specified duties subject to safeguards conditions and limitations. Thus what Rule 5 envisages is not rebate of duty paid but refund of credit of specified duty which is not an issue covered under Section 35B(1) of the Central Excise Act 1944. Hence the case is not maintainable under Section 35EE of the Act.

12.4 Government in a catena of its decisions as in the case of M/s Resource Technologies Pvt. Ltd., Hyderabad Order No.13/13-Cx dated 04.01.2013, M/s Hy Tech

Engineers Pvt. Ltd., Chinchwad Pune, Order No.105/2013-Cx dated 06.02.2013 and M/s Jubilant Life Sciences Ltd., Uttarakhand, Order No.103-124/2015-Cx dated 30.09.2015 has consistently held that as refund of unutilized credit under Rule 5 of Cenvat Credit Rules 2014 is not covered in the first provisio to Sub-Section (1) of Section 35B, revision application under Section 35EE of the Central Excise Act is not maintainable.

13. In view of the above facts and circumstances, the Revision Application is held to be filed in time in compliance to provisions of Section 35EE(2) of the Central Excise Act, 1944. However, as the Application filed before Central Government is beyond jurisdiction in terms of Section 35EE read with Section 35B(1), it cannot be held to be maintainable before this authority. The applicant is at liberty to approach the appropriate authority under Section 35B of Central Excise Act, 1944 for decision of case on merits.

14. Revision Application is disposed off in above terms.

15. So, ordered.

(RIMJHIM PRASAD)
Joint Secretary to the Government of India

Commissioner of Customs and Central Excise
C.R.Building, Hqrs. Office,
Kannavarithota,
Guntur-522004

ATTESTED.

BHAGWAT P. SHARMA
OSD (R.A. WING)

ORDER NO.56/2016-CX DATED 18.04.2016

Copy to:-

1. M/s Blue Whale Industries, Guntur.
2. The Commissioner (Appeals-II), Customs & Central Excise, C.R.Building, Hqrs. Office.
3. Kannavarithota, Guntur-522004.
4. The Assistant Commissioner, Customs, Central Excise & Service Tax Guntur Division Guntur-522004.
5. PA to JS (RA).
6. Guard File.
7. Spare Copy.

ATTESTED

(B.P.Sharma)
OSD (Revision Application)

BHAGWAT P. SHARMA
OSD (R.A. WING)