CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. I

EXCISE APPEAL No. 51131 OF 2020

(Arising out of Order-in-Appeal No. IND-EXCUS-000-APP-018-20-21 dated 08.07.2020 passed by the Commissioner (Appeals) Customs, CGST & Central Excise, Indore (M.P.))

Assistant Commissioner (Review), CGST & Central Excise ...Appellant
29, Administrative Area, Bharatpuri,
Ujjain-456001 (M.P.)

versus

M/s. Shakti Pumps (I) Limited, ...Respondent
Plot No. 401, 402 & 413, Sector-III,
Industrial Area, Pithampur,
Dist. Dhar (M.P.)

APPEARANCE:

Shri Rakesh Agarwal, Authorized Representative for the Department
Ms. Sukriti Das and Shri Shivam Bansal, Advocates for the Respondent

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

Date of Hearing: 25.06.2024
Date of Decision: 08.07.2024

FINAL ORDER NO. 56004/2024

JUSTICE DILIP GUPTA:

This appeal has been filed by the department for quashing the order dated 08.07.2020 passed by the Commissioner (Appeals) Customs, CGST & Central Excise, Indore[1], by which the appeal filed by M/s. Shakti Pumps (I) Limited, [2] against the order dated 11.02.2020 passed by the Assistant Commissioner has been allowed and the order has been set aside. The Assistant Commissioner had,

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1. **the Commissioner (Appeals)**
2. **Shakti Pumps**

by the order dated 17.02.2020, rejected the refund claims filed by Shakti Pumps. The Commissioner (Appeals) has held that Shakti Pumps is entitled to refund in cash of Countervailing Duty[3] and Special Additional Duty[4] in terms of section 142(3) of the Central Goods and Services Tax Act, 2017[5] subject to verification of unjust enrichment.

2. Shakti Pumps is engaged in the manufacture of submersible pumps, power driven pumps, centrifugal pumps and solar pumping systems. It is registered with the Good and Service Tax department, but before the introduction of the CGST Act it was registered with the Central Excise department.

3. Shakti Pumps was availing CENVAT credit of duty paid on the input goods as well as on the service tax paid on input services which were used in manufacture of the final products in terms of rule 3 read with rule 4 of the CENVAT Credit Rules, 2004[6] and it also filed the statutory monthly ER-1 returns.

4. The Central Government, from time to time, publishes Foreign Trade Policy[7] under the powers conferred upon it by section 5 of the Foreign Trade (Development & Regulation) Act, 1992. The objective of the FTP is to make exports from India more competitive. In furtherance of this objective, Chapter 4 of the FTP provides for various Duty Exemption Schemes such as the Advance Authorization[8] Scheme and Duty-Free Import Authorization to enable duty free import of inputs procured for export production. The AA Scheme

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3. CVD
4. SAD
5. the CGST Act
6. the 2004 Credit Rules
7. FTP
8. AA

specifically allows for duty-free import of inputs that are physically incorporated in the exported goods.

5. The Central Government issued a Notification dated 01.04.2015 exempting material imported into India against a valid AA issued by the Regional Authority from, amongst others, the whole of the duty of customs, SAD and CVD leviable thereon. However, this was reject to the following relevant conditions:

> "(i) xxxxxxxxx
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> (ii) xxxxxxxxx
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> (iii) xxxxxxxxx
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> (iv) **that in respect of imports made before the discharge of export obligation in full, the importer at the time of clearance of the imported materials executes a bond** with such surety or security and in such form and for such sum as may be specified by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, **binding himself to pay on demand an amount equal to the duty leviable, but for the exemption contained herein, on the imported materials in respect of which the conditions specified in this notification are not complied with, together with interest at the rate of fifteen percent per annum from the date of clearance of the said materials.**
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> (v) **that in respect of imports made after the discharge of export obligation in full,** if facility under rule 18 (rebate of duty paid on materials used in the manufacture of resultant product) or sub-rule(2) of rule 19 of the Central Excise Rules, 2002 or of CENVAT Credit under CENVAT Credit Rules, 2004 has been availed, then the importer shall, at the time of clearance of the imported materials furnish a bond to the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, binding himself, to use the imported materials in his factory or in the factory of his supporting manufacturer for the manufacture of dutiable goods and to submit a

certificate, from the jurisdictional Central Excise officer or from a specified chartered accountant within six months from the date of clearance of the said materials, that the imported materials have been so used.

Provided that if the importer pays additional duty of customs leviable on the imported materials but for the exemption contained herein, then the imported material may be cleared without furnishing a bond specified in this conditions and the additional duty of customs so paid shall be eligible for availing CENVAT Credit under the CENVAT Credit Rules, 2004;

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(emphasis supplied)

6. To avail the said benefit, Shakti Pumps applied for and was issued five AA's for import of raw materials and components such as solar pump drive, stainless steel sheets, coils and CRNGO. The items imported under the aforesaid AA's without payment of duty were, however, not fully consumed by Shakti Pumps in the manufacture of the finished export goods within the period specified in the respective AA's.

7. On account of shortfall in the fulfillment of its export obligation within the time specified in AA, Shakti Pumps suo-motu discharged the appropriate CVD and SAD amounting to Rs. 1,35,10,358/- through several challans. Shakti Pumps also suo-motu paid CVD and SAD amounting to Rs. 1,10,44,821/- on import of solar pump controllers, solar pump inverter, frequency inverter and solar pump drive due to objections having been raised by the department.

8. The Goods and Services Tax regime was implemented w.e.f. 01.07.2017 wherein taxes such as Central Excise and Service Tax

were subsumed into the CGST Act. The CVD and SAD that were paid under the erstwhile regime were replaced with Integrated Goods and Services Tax under the provisions of the Integrated Goods and Service Tax Act, 2017.

9. Shakti Pumps claims that under the erstwhile regime i.e. prior to 01.07.2017, it was entitled to avail CENVAT credit of CVD and SAD paid for regularization of the unutilized duty-free inputs imported under the AA Scheme in terms of rule 3 read with rule 9 of the 2004 Credit Rules.

10. Shakti Pumps filed two refund claims on 9.5.2019 before the Joint Commissioner of State Tax, GST Indore claiming refund of CENVAT credit in cash in respect of CVD amounting to Rs. 1,35,10,358/- and SAD amounting to Rs. 1,10,44,821/- paid by it post implementation of CGST Act in terms of section 142(3) read with section 142 (6)(a) of the CGST Act. However, the Joint Commissioner, by letters dated 26.09.2019, communicated that it was not the appropriate authority. The refund applications were, therefore, re-submitted by Shakti Pumps before the Assistant Commissioner seeking refund of CENVAT credit in cash of CVD amounting to Rs. 1,35,10,358/- by the first application dated 21.06.2019, and refund of CENVAT credit in cash of SAD of Rs. 1,10,44,821/- by the second application dated 25.06.2019 in terms of section 142(3) and section 142(6)(a) of the CGST Act, which applications were received on 08.07.2019.

11. However, Shakti Pumps received a letter dated 13.08.2019 from the Assistant Commissioner seeking explanation as to why Input

Tax Credit[9] of CVD and SAD was not taken by Shakti Pumps by filing Form GST TRAN-1. Shakti Pumps submitted an explanation by a letter dated 05.09.2019.

12. A show cause notice dated 17.09.2019 was then issued to Shakti Pumps proposing to reject the refund claim on the grounds that it could not be claimed under section 142(3) of the CGST Act; the payment of CVD and SAD was made suo moto by Shakti Pumps on various dates after 01.07.2017 and so section 142(6)(a) of the CGST Act would not be applicable; as the payment of CVD and SAD was made on various dates after 01.07.2017 suo-moto and not pursuant to any assessment or adjudication proceedings under the erstwhile law, section 142(8)(b) of the CGST Act would not be applicable; had it paid CVD and SAD prior to 01.07.2017, then the same would have been carried forward as ITC through Form GST TRAN-1, but the same was not availed.

13. Shakti Pumps filed a detailed reply dated 21.10.2019 contesting the allegations made in the show cause notice. Reliance was also placed on various adjudication orders as well as orders passed by Commissioner (Appeals) wherein cash refund of CVD and SAD paid after 01.07.2017 was granted under section 142(3) of the CGST Act read with section 11B of the Excise Act.

14. The Assistant Commissioner, by order dated 11.02.2020, however, rejected the refund claims.

15. Feeling aggrieved, Shakti Pumps filed an appeal on 09.06.2020 before the Commissioner (Appeals) and the Commissioner (Appeals), by order dated 08.07.2020, allowed the refund of Rs. 2,45,55,179/-

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9. ITC

in cash. The Commissioner (Appeals) recorded a finding that there could be no doubts that Shakti Pumps was eligible for CENVAT credit and, therefore, the Assistant Commissioner committed an illegality in rejecting the claim. The Commissioner (Appeals), therefore, held that Shakti Pumps would be entitled to refund in cash of CVD and SAD in terms of section 142(3) of the CGST Act, subject to verification of unjust enrichment by the sanctioning officer.

16. It is stated that pursuant to the said order passed by the Commissioner (Appeals), the sanctioning officer verified the condition of unjust enrichment, and refund was sanctioned by an order dated 30.12.2020.

17. The department has filed the present appeal for setting aside the order dated 08.07.2020 passed by the Commissioner (Appeals).

18. Shri Rakesh Agarwal, learned authorized representative appearing for the department made the following submissions:

(i) CVD and SAD are not duties paid under the 'existing law' as defined under section 2(48) of the CGST Act and there is no machinery and mechanism for refund of CVD and SAD under the Central Excise Act 1944[10];

(ii) Mere specifying any duty as eligible for CENVAT credit does not make it so unless eligibility is proved under the Rules. The notification does not allow CENVAT credit of duties paid due to default and, therefore, allowing CENVAT credit of default duties would be against the mandate of the notification. A party that has availed benefit on an assurance and

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10. the Central Excise Act

undertaking that it shall perform certain acts necessary for the enjoyment of the benefit cannot be permitted to enjoy the benefit even after violating the conditions subject to which the benefit was extended. In this connection reliance has been placed on the judgement of the Delhi High Court in **Rai Agro Industries Ltd.** vs. **Director General of Foreign Trade**[11];

(iii) Section 142(6)(a) of the CGST Act relates to claim of CENVAT credit in proceedings relating to appeal, review or reference and as the said provision is not satisfied, the question of grant of refund of the same is illegal and unjustified;

(iv) The officer sanctioning the refund cannot sit in judgment or modify the assessment by the assessing officer. Since every Bill of Entry is an assessment by itself, a Bill of Entry can be appealed against, which is not the case here. Therefore, the applicability of section 142(8)(b) has been wrongly invoked by Shakti Pumps for seeking refund, as no proceeding of assessment or adjudication was instituted;

(v) Shakti Pumps had not discharged the onus to prove unjust enrichment. The imported goods could not be used for export and were used for domestic production. The duty paid on the inputs shall be presumed to have been recovered unless proved otherwise in term of section 12B of the Central Excise Act;

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11. 2006 (206) E.L.T. 123 (Del.)

(vi) Allowing CENVAT credit of duties paid in case of default is against the intention and stipulation of the notification. Had the intention been to allow CENVAT credit, the legislature would have provided for such a provision in the notification. In this Connection reliance has been placed on the judgment of the Supreme Court in **Union of India** vs. **Ind-Swift Laboratories Ltd**[12];

(vii) Shakti Pumps had not complied with the provisions of the 2004 Credit Rules and so it would not be eligible to avail CENVAT credit and refund thereof; and

(viii) The transitional provisions under section 142 of the CGST Act in respect of CENVAT credit would be applicable only when CENVAT credit was taken prior to 30.06.2017.

19. Ms. Sukriti Das, learned counsel appearing for the respondent, however, contended that Shakti Pumps was entitled to claim cash refund of CENVAT credit paid under the existing law in terms of section 142(3) of the CGST Act and made the following submissions to support this contention:

(i) In terms of the provisions of rule 3(1) read with rule 9 of the 2004 Credit Rules, as applicable prior to 1.7.2017, Shakti Pumps was entitled to claim CENVAT credit of CVD and SAD paid on imports, including CVD and SAD paid as a consequence of the non-fulfillment of export obligations in terms of the licenses issued under the AA Scheme;

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12. 2011 (265) E.L.T. 3 (S.C.)

(ii) The right to claim CENVAT credit is saved by section 174 of CGST Act;

(iii) CENVAT credit is a vested and indefensible right of Shakti Pumps;

(iv) The issue involved in this appeal has been settled in favour of Shakti Pumps by various decisions of the Tribunal, wherein refund of CVD and SAD paid after 01.07.2007 during the CGST regime to regularize duty-free imports under AA has been allowed in cash under section 142(3) of the CGST Act; and

(v) Shakti Pumps is entitled in law to claim cash refund of CVD and SAD paid after introduction of CGST Act, as it had moved out of the CENVAT Scheme.

20. The submissions advanced by the learned authorized representative appearing for the department and the learned counsel appearing for the respondent have been considered.

21. The issue that arises for consideration in this appeal is as to whether Shakti Pumps was entitled to claim refund of CENVAT credit in cash on the amount of CVD and SAD paid under the existing law under the provisions of section 142(3) of the CGST Act.

22. In order to appreciate this issue, it would be appropriate to refer to the relevant provisions.

23. The term 'assessment' has been defined in section 2(11) of the CGST Act and it is as follows:

> "**2(11)**"assessment" means determination of tax liability under this Act and includes self-assessment, re-assessment, provisional assessment, summary assessment and best judgment assessment"

24. The term 'existing law' is defined in section 2(48) of the CGST Act and it is as follows:

> "**2(48)**"existing law" means any law, notification, order rule or regulation relating to levy and collection of duty or tax on goods or services or both passed or made before the commencement of this Act by Parliament or any Authority or person having the power to make such law, notification, order, rule or regulation."

25. Chapter XX of the CGST Act deals with 'Transitional Provisions'. It contains, amongst others, sections 139, 140 and 142.

26. Section 139 of the CGST Act, which came into force on 22.06.2017, deals with 'migration of existing taxpayers'. Sub-section (1) of section 139 is reproduced below:

> "**139 (1)** On and from the appointed day, every person registered under any of the existing laws and having a valid Permanent Account Number shall be issued a certificate of registration on provisional basis, subject to such conditions and in such form and manner as may be prescribed, which unless replaced by a final certificate of registration under sub-section (2), shall be liable to be cancelled if the conditions so prescribed are not complied with."

27. Section 140 of the CGST Act came into force on 01.07.2017. Sub-section (1) of section 140 is reproduced below:

> "**140 (1)** A registered person, other than a person opting to pay tax under section 10 shall be entitled to take, in his electronic credit ledger, the amount of CENVAT credit of eligible duties carried forward in the return relating to the period ending with the day immediately preceding the appointed day, furnished by him under the existing law within such time and in such manner as may be prescribed:
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> Provided that the registered person shall not be allowed to take credit in the following circumstances, namely:

(i) where the said amount of credit is not admissible as input tax credit under this Act; or

(ii) where he has not furnished all the returns required under the existing law for the period of six months immediately preceding the appointed date; or

(iii) where the said amount of credit relates to goods manufactured and cleared under such exemption notifications as are notified by the Government."

28. Section 142 of the CGST Act came into force on 01.07.2017. Sub-sections (3), (6)(a) and (6)(b), are reproduced below:

"**142 (3)** 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 (1 of 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.

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(6) (a) every proceeding of appeal, review or reference relating to a claim for CENVAT credit initiated whether before, on or after the appointed day under the existing law shall be disposed of in accordance with the provisions of existing law, and any amount of credit found to be admissible to the claimant shall be refunded

to him 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 (1 of 1944) and the amount rejected, if any, shall not be admissible as input tax credit under this Act:

Provided 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;

(b) every proceeding of appeal, review or reference relating to recovery of CENVAT credit initiated whether before, on or after the appointed day under the existing law shall be disposed of in accordance with the provisions of existing law and if any amount of credit becomes recoverable as a result of such appeal, review or reference, the same shall, unless recovered under the existing law, be recovered as an arrear of tax under this Act and the amount so recovered shall not be admissible as input tax credit under this Act."

29. Chapter XXI of the CGST Act deals with Miscellaneous matters. Section 173, which is contained in Chapter XXI, deals with amendment of the Finance Act. It came into force on 01.07.2017 and is reproduced below:

"**173. Amendment of Act 32 of 1994**

Save as otherwise provided in this Act, Chapter V of the Finance Act, 1994 shall be omitted."

30. Section 174, which also came into on 01.07.2017, deals with repeal and saving. Sub-section (1) and clause (f) of sub-section (2) are reproduced below:

"**174. Repeal and Saving**

(1) Save as otherwise provided in this Act, on and from the date of commencement of this Act, the Central Excise Act, 1944 (1 of 1944) (except as respects goods included in entry 84 of the Union List of the Seventh

> Schedule to the Constitution), the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 (16 of 1955), the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957), the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978, and the Central Excise Tariff Act, 1985 (5 of 1986 (hereafter referred to as the repealed Acts) are hereby repealed.
>
> **(2)** The repeal of the said Acts and the amendment of the Finance Act, 1994 (hereafter referred to as "such amendment" or "amended Act", as the case may be) to the extent mentioned in the sub-section (1) or section 173 shall not —
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> (a) *****
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> (b) *****
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> (c) *****
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> (d) *****
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> (e) *****
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> (f) affect any proceedings including that relating to an appeal, review or reference, instituted before on, or after the appointed day under the said amended Act or repealed Acts and such proceedings shall be continued under the said amended Act or repealed Acts as if this Act had not come into force and the said Acts had not been amended or repealed."

31. The CENVAT Rules were made under section 37 of the Excise Act and section 94 of the Finance Act. Under rule 4(7), CENVAT credit in respect of input service was allowed, on or after the day on which the invoice, bill or, as the case may be, challan referred to in rule 9 was received. Under rule 9(1)(e) of the CENVAT Rules, credit can be taken on the basis of a challan evidencing payment of service tax, by the service recipient as the person liable to pay service tax. Section 173 of the CGST Act provides that save as otherwise provided in this Act, Chapter V of the Finance Act shall be omitted. Section 174(1) of the CGST Act further provides that save as otherwise provided in this Act, on and from the date of commencement of this Act i.e.

01.07.2017, the Excise Act and some other Acts referred to are repealed.

32. It is in the light of the aforesaid factual and legal position that the contentions that have been advanced by the learned authorised representative appearing for the department and the learned counsel appearing for the respondent have to be considered.

33. It is not in dispute that Shakti Pumps could not fulfil the export obligations within the time specified in AA and it suo-moto discharged the payment of duty and the appropriate CVD and SAD with interest after 01.07.2017, on which date the CGST Act was implemented. In terms of the 2004 Credit Rules, as applicable prior to 01.07.2017, Shakti Pumps was entitled to claim CENVAT credit of CVD and SAD paid on imports. In response to the query sought by the Assistant Commissioner in the letter dated 30.08.2019 Shakti Pumps explained that out of the thirteen payments of CVD and SAD through GAR-7 challans, only two challans were within the period when GST Tran-1 was open on the common portal, but due to human error the two payments could not be included. As the 2004 Credit Rules were framed under the Excise Act, the appellant could not have claimed CENVAT credit in respect of the input service under the provisions of the CENVAT Credit Rules after 01.07.2017 as they ceased to exist.

34. Section 142, as noticed above, deals with Miscellaneous Transitional Provisions. Sub-section (3) provides that every claim for refund filed by any person before, on or after the appointed day, for refund of any amount of CENVAT credit or any other amount paid under the existing law, shall be disposed of in accordance with the provisions of the 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. However, 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 the CGST Act.

35. Thus, under sub-section (3) of section 142, the claim for refund of any amount of CENVAT credit has to be disposed of in accordance with the provisions of the existing law. 'Existing law' under section 2(48) of the CGST Act means any law relating to levy and collection of duty or tax on goods or services or both passed or made before the commencement of the CGST Act. The existing law, therefore, would be Chapter V of the Finance Act and the Central Excise Act.

36. Section 173 of the CGST Act provides that save as otherwise provided in the CGST Act, Chapter V of the Finance Act, shall be omitted. Section 174(1) of the CGST Act provides that save as otherwise provided in the CGST Act, on or from the date of commencement of the CGST Act i.e. 01.07.2017, the Excise Act shall stand repealed. Upon repeal of the Excise Act, the 2004 Credit Rules automatically stood repealed. The appellant, therefore, could not have claimed refund under rule 4(7) of the 2004 Credit Rules. The appellant could also not have taken in his electronic credit ledger the amount of the CENVAT credit under section 140(1) of the CGST Act because the service tax return had been filed before the deposit of the service tax, except in two cases where because of human error it could not be done. It is for this reason that the appellant had filed two applications under sub-section (3) of the section 142 of the CGST

Act, which applications were rejected and the appeal filed by the appellant before the Commissioner (Appeals) was also rejected.

37. It would be pertinent to reproduce the relevant portions of the application dated 21.06.2019 submitted by Shakti Pumps to the Assistant Commissioner for cash refund of CENVAT credit amounting to 1,35,10,358/- and the same is reproduced below:

> "3. Due to some technical reasons certain import items imported under the aforesaid Advance Authorisation, without payment of Customs Duty, was not consumed fully, for export of **Solar Pump Controller and Submersible Motors**, within specified period of Advance Authorisation.
>
> xxxxxxxxxx
>
> 5. Since there was shortfall in fulfilment of Export Obligation under the aforesaid Advance Licences Balance due to which balance quantity of Solar Pump Drive, DCMCB, Stainless Steel Sheet/Coils and CRNGO which was not utilised (imported in excess), we had paid CVD & SAD of Rs. 1,35,10,358.00/- paid by us, vide the above mentioned Challans.
>
> 6. **We can apply for Refund of CENVAT Credit, which, we have earned against payment of CVD and SAD but after 01.07.2017, such CENVAT Credit, could not be availed and Refund for the said Credit Facility, is applied in terms of Sections 142(3) and 142(6)(a) of the CGST Act, 2017.**
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> xxxxxxxxx
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> 11. **From the reading of the Transitional Provisions, under CGST Act, 2017, it is clear that Refund of CENVAT Credit, accruing as per earlier Law, is to be paid in Cash.**
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> 12. **We would also like to place on record that the Assistant Commissioner, Central GST & Central Excise, Division-VII, Vadodara-I Commissionerate, vide Order-in-Original No., Div-Vii/41/RR Kabel/Ref/17-18, dated 20.06.2018 (ANNEXURE:1, hereto), has granted Refund in**

> **Cash, under the provisions of Section 142(3) of CGST Act, 1944, read with, Section 11-B of Central Excise Act, 1944, to M/S. R.R. Kabel Limited, WAGHODIA, VADODARA, who have paid CVD and SAD, towards excess Import & Export Obligation Discharge Certificate, against some Advance Licences.** Here also, the Claimant was admissible to CENVAT Credit of CVD and SAD, under erstwhile CENVAT Credit Rules, 2004 but since the payment was made on 15.12.2017, under GST Regime, they were not in a position to avail CENVAT Credit.
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> 14. In view of the aforesaid Legal Provisions, you are requested to kindly refund us Rs. 1,35,10,358.00, by Cash."
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> **(emphasis supplied)**

38. A similar refund application dated 25.06.2019 was filed by Shakti Pumps before the Assistant Commissioner for cash refund of Rs. 1,10,44,821/-.

39. The Commissioner (Appeals) noticed that under the 2004 Credit Rules, Shakti Pumps was entitled to claim credit of CVD and SAD, which claim was not questioned by the Assistant Commissioner since the only ground for rejection of the refund claims is that the said duties were paid after 01.07.2017. After referring to the relevant provisions of the CGST Act, the Commissioner (Appeals) held that Shakti Pumps was entitled to claim refund in cash of the CVD and SAD amount in terms of section 142(3) of the CGST Act, but the sanctioning authority would have to examine the aspect of unjust enrichment. It has been stated by the learned counsel appearing for Shakti Pumps that pursuant to the order passed by the Commissioner (Appeals), the sanctioning officer verified the condition of unjust enrichment and sanctioned refund by order dated 30.12.2020.

40. Learned authorised representative appearing for the department submitted that CVD and SAD are duties which were not paid by Shakti Pumps under the 'existing law' as they were paid because Shakti Pumps failed to fulfil the export obligation within the time specified in the AA's.

41. It is not possible to accept this contention. In the normal course, Shakti Pumps, would have had to pay CVD and SAD on import of the raw materials and components and it is only because of the AA Scheme that allows for duty free import of inputs that are physically incorporated in the exported goods that Shakti Pumps did not pay CVD and SAD. It is on account of non-fulfilment of the export obligation specified in AA that Shakti Pumps was required to pay CVD and SAD with interest. CVD and SAD are obviously paid under the Tariff Act and collected under the Customs Act and the AA authorisation merely provided that in case the conditions are not satisfied, CVD and SAD, which otherwise were required to be paid, had to deposited with interest. Learned authorised representative, therefore, is not justified in contending that CVD and SAD were not paid under the existing law.

42. Learned authorised representative also submitted that CENVAT credit could be availed only if the notification allowed it to avail CENVAT credit.

43. It is also not possible to accept this contention of the learned authorised representative appearing for the department. Shakti Pumps was entitled to avail CENVAT credit under the 2004 Credit Rules and it did so. There was no necessity for a clause to be inserted in the notification that CENVAT credit would also be available if CVD

and SAD are subsequently paid because the conditions of the notification have not been satisfied.

44. Reliance placed by the learned authorised representative on the judgment of the Delhi High Court in **Rai Agro Industries** is misplaced. The question that fell for consideration before the High Court in the Writ Petition filed by Rai Agro Industries was whether the demand made by the department for payment of interest on the deferential customs duty payable on the import of machinery under Export Promotion Capital Goods Scheme was valid. In regard to the issue as to whether the demand for payment of interest was legally sound and enforceable against the Writ Petitioner, the High Court noticed that two facets of this question were required to be examined. The first aspect was as to whether the High Court ought to interfere at the instance of a party which had equivocally and unconditionally undertaken to pay the duty amount saved on the import of equipment together with interest at the agreed rate in the event of its failure to discharge the export obligation. It is in this context the High Court observed as follows:

> "16. xxxxxxxxx. The question then is whether a party who has availed of a benefit on a solemn assurance and a legal undertaking that it shall perform certain acts necessary for the enjoyment of the benefit being extended in its favour could continue enjoying those benefits while the conditions subject to which the benefit was extended are violated. **Our answer is in the negative. No party can avail of a benefit which was available subject to its performing conditions prescribed for the same, without performing such conditions. If the conditions fail, the party cannot retain the benefit.** There is no equity in favour of a person who has availed of a benefit but failed to perform the obligation subject to which alone it could

> take such benefit. If that be so, as it indeed is, we see no reason why this court should come to the rescue of a party who fails to do equity in exercise of our equitable jurisdiction. It is trite that one who seeks equity must do equity. **The petitioner having failed to discharge its part of the obligation despite the assurance and undertaking furnished cannot be granted any relief in the equitable jurisdiction of this court.**"
>
> **(emphasis supplied)**

45. The second aspect, the High Court observed was regarding the chargeability of interest on duty which was payable but was not paid in view of the exemption granted subject to fulfilment of the conditions prescribed in such exemption. In regard to the second aspect, the High Court observed as follows:

> "17. xxxxxxxxxx. But for the exemption from payment of duty under the EPCG scheme, the petitioner would have been liable to pay the duty at the rate stipulated for the imports made by it. A concessional rate was, however, applied to the said imports subject to the petitioner's satisfying the requirements stipulated for the said benefit. **No sooner it is found that the petitioner has failed to perform its export obligation which was one of the conditions for applying a concessional rate of duty, the exemption would cease to be effective and the liability to pay the duty at the rate ordinarily applicable re-emerge. Consequently non-payment of the differential would attract payment of interest in terms of the statutory provisions referred to above.**"
>
> **(emphasis supplied)**

46. In the present case, it is not in dispute that Shakti Pumps had not only deposited CVD and SAD on account of non-fulfilment of the export obligation contained in the AA but had also paid interest. This decision would, therefore, not come to the aid of the department.

47. Learned authorised representative appearing for the department also placed reliance upon the judgment of the Supreme Court in **Ind-Swift Laboratories** to contend that in the absence of any stipulation in the notification, allowing CENVAT credit in case of default, would be rewarding Shakti Pumps and against the intention and stipulation in the notification.

48. The decision of the Supreme Court in **Ind-Swift Laboratories** does not help the department. The High Court had read down the provisions of rule 14 of the 2004 Credit Rules, which rule deals with recovery of CENVAT credit wrongly taken or erroneously refunded. The relevant paragraphs of the judgment of the Supreme Court are reproduced below:

> "16. **A bare reading of the said Rule would indicate that the manufacturer or the provider of the output service becomes liable to pay interest along with the duty where CENVAT credit has been taken or utilized wrongly or has been erroneously refunded and that in the case of the aforesaid nature the provision of Section 11AB would apply for effecting such recovery.**
>
> 17. We have very carefully read the impugned judgment and order of the High Court. The High Court proceeded by reading it down to mean that where CENVAT credit has been taken and utilized wrongly, interest should be payable from the date the CENVAT credit has been utilized wrongly for according to the High Court interest cannot be claimed simply for the reason that the CENVAT credit has been wrongly taken as such availment by itself does not create any liability of payment of excise duty. **Therefore, High Court on a conjoint reading of Section 11AB of the Act and Rules 3 & 4 of the Credit Rules proceeded to hold that interest cannot be claimed from the date of wrong availment of CENVAT credit and that the interest would be payable from the date CENVAT**

> **credit is wrongly utilized. In our considered opinion, the High Court misread and misinterpreted the aforesaid Rule 14 and wrongly read it down without properly appreciating the scope and limitation thereof.** xxxxxxxxxx.
>
> 18. **We do not feel that any other harmonious construction is required to be given to the aforesaid expression/provision which is clear and unambiguous as it exists all by itself. So far as Section 11AB is concerned, the same becomes relevant and applicable for the purpose of making recovery of the amount due and payable. Therefore, the High Court erroneously held that interest cannot be claimed from the date of wrong availment of CENVAT credit and that it should only be payable from the date when CENVAT credit is wrongly utilized. xxxxxxxxxxx.**
>
> 19. A taxing statute must be interpreted in the light of what is clearly expressed. It is not permissible to import provisions in a taxing statute so as to supply any assumed deficiency. xxxxxxxxxxxx"
>
> **(emphasis supplied)**

49. The said decision of the Supreme Court in **Ind-Swift Laboratories** would not be applicable in the present case. This decision merely holds that rule 14 of the 2004 Credit Rules cannot be read down and that interest can be claimed from the date of wrong availment of CENVAT credit. In the instant case, as noticed above, Shakti Pumps could claim refund of CENVAT credit in terms of the 2004 Credit Rules even if clause (iv) of the notification dated 01.04.2015 issued by the Central Government did not contain such a provision. In any view of the matter, this was not even the allegation made in the show cause notice that was issued to Shakti Pumps when the refund applications were filed. It is, therefore, not open to the department to raise this issue for the first time in this appeal.

50. Learned authorised representative also submitted that the provisions of section 142(6)(a) of the CGST Act were wrongly relied upon.

51. It is seen from the order passed by the Commissioner (Appeals) that the refund of CENVAT credit in cash has been granted under section 142(3) of the CGST Act. Section 142(6)(a) of the CGST Act, which deals with proceedings of appeal, review or reference relating to claim for CENVAT credit, would not be applicable and any reference to this section in connection with the claim of unjust enrichment is a mere mistake, because even otherwise the claim of unjust enrichment has also to be examined. under section 142(3) of the CGST Act.

52. In any view of the matter, the claim of unjust enrichment was examined by the sanctioning authority when it granted refund to Shakti Pumps by order dated 30.12.2020 pursuant to the order passed by the Commissioner (Appeals).

53. Leaned authorised representative appearing for the department also submitted that mere specifying any duty as eligible for CENVAT credit would not make it eligible unless the eligibility is proved under the 2004 Credit Rules.

54. This contention of learned authorised representative appearing for the department cannot be accepted as there is a specific provision in the 2004 Credit Rules for allowing CENVAT credit. The show cause notice that was issued to Shakti Pumps did not allege that the requirements contained in the said 2004 Credit Rules had not been satisfied by Shakti Pumps. It is, therefore, not open to the learned authorised representative appearing for the department to now

contend that Shakti Pumps had not complied with the provisions of the 2004 Credit Rules. Even otherwise, the adjudicating authority had also not questioned this aspect as has been noticed by the Commissioner (Appeals).

55. Learned authorised representative also submitted that the transitional provisions under section 142 of the CGST Act in respect of CENVAT credit would be applicable only when CENVAT credit was taken prior to 30.06.2017.

56. Section 142(3) of the CGST Act does not contain such a stipulation.

57. This issue was examined by a Larger Bench of the Tribunal in M/s. B **M/s. Bosch Electrical Drive India Private Limited** vs. **Commissioner of Central Tax, Chennai**[13] and the relevant portion of the order of the Larger Bench is reproduced below:

> "8. The Deputy Commissioner, by order dated 24.04.2019, rejected the refund claim filed by the appellant for the reason that after the implementation of CGST Act on 01.07.2017, the CENVAT Rules ceased to be in force and the claim under section 142(3) of CGST Act cannot be considered to be under the 'existing law' as the service tax was not paid in time but on 08.12.2017 after the CGST Act had come into force.
>
> xxxxxxxxxxx
>
> 16. In the present case, the appellant had deposited the short payment of service tax under the reverse charge mechanism in respect of import of service on 08.12.2017, after the time period prescribed for filing the last ST-3 Return had expired. This amount was, therefore, not reflected in the ST-3 Return. The CGST Act came into force w.e.f. 01.07.2017. The appellant, therefore, could not claim the transition of the input

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13. 2023 (12) TMI 1145 - CESTAT Chennai

> credit under section 140 of the CGST Act. The appellant could not also avail CENVAT credit under the CENVAT Rules as they were no longer in force after the introduction of the CGST Act.
>
> 17. It is for this reason that the appellant filed an application under section 142(3) of the CGST Act claiming refund of the amount of CENVAT credit paid by the appellant. This claim of the appellant was rejected by the Deputy Commissioner by the order dated 24.04.2019 and the appeal filed by the appellant before the Commissioner (Appeals) was also rejected by the order dated 21.09.2019.
>
> xxxxxxxxxxxx
>
> 49. In the present case, the service tax was paid under the provisions of Chapter V of the Finance Act and refund was claimed under sub-section (3) of section 142 of the CGST Act, under which the claim was required to be disposed of in accordance with the provisions of the existing law. **Therefore, even if the service tax had been deposited by the appellant after 01.01.2017, nonetheless the refund of any amount of the CENVAT credit could be claimed only under sub-section (3) of section 142 of the CGST Act and against this order an appeal will lie to the Tribunal.**"
>
> **(emphasis supplied)**

58. Learned authorised representative appearing for the department, however, placed reliance upon the decision of the Tribunal rendered by a learned Member in **CAD Vision Engineers Pvt. Ltd.** vs. **Commissioner of Customs & Central Tax (Appeals-I)**[14]. The relevant observations made by the learned Member in the aforesaid decision are as follows:

> "13. Therefore, essentially when there is no provision in the law either under the Cenvat Credit Rules 2004 or in the Finance Act 1994 to allow cash refund, for such accumulated credit, Section 142(3), per se, cannot

14. (2024) 19 Centax 289 (Tri.-Hyd.)

> make it an eligible refund merely because the appellant have not been able to utilize on the ground of not having filed the revised return or were not able to take the TRAN-1 route etc., within specified time. xxxxxxxx."

59. Even though this decision was rendered on 30.04.2024 after the Larger Bench of the Tribunal in **Bosch Electrical** had answered the reference on 21.12.2023, but it appears that the order of the Larger Bench of the Tribunal was not placed before the learned Member. In view of the order of the Larger Bench of the Tribunal in **Bosch Electrical**, the said decision does not lay down the correct law.

60. Learned authorised representative appearing for the department has also placed reliance on the decision rendered by a learned Member of the Tribunal in **Servo Packaging Ltd.** vs. **Commr. of GST and C. Ex., Puducherry**[15]. The relevant portion of the decision is reproduced below:

> "2. Brief facts leading to the present controversy are, **the assessee made a request for refund of the Customs Duty paid, due to unfulfilled export obligation against Advance Authorization, under Section 142(3) of the CGST Act, 2017.** The assessee-appellant could not fulfil its export obligation in some cases, as per annexure to its request for refund dated 16-5-2019, owing to lack of export orders, which prompted the appellant to pay off the Customs Duties on account of short export and thereby close the export obligation under the above Advance Licences. It is also an admitted fact that the above Customs Duty was paid along with appropriate interest. **It is the case of the appellant that since the inputs imported by it were used in the manufacture of final products on which Central Excise Duty/GST, as the case may be, was paid/to be paid, they were eligible for**

15. 2020 (373) E.L.T. 550 (Tri.- Chennai)

refund of CVD and SAD paid. Further, post the introduction of GST, the appellant having left with no option to claim the above credit under the CENVAT Credit Rules with also no scope to report the same under Transitional Credit while migrating to GST, the refund in cash was claimed under Section 142(3) ibid.

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10. **Thus, the availability of CENVAT paid on inputs despite failure to meet with the export obligation may not hold good here since, firstly, it was a conditional import and secondly, such import was to be exclusively used as per FTP.** Moreover, such imported inputs cannot be used anywhere else but for export and hence, claiming input credit upon failure would defeat the very purpose/mandate of the Advance Licence. Hence, claim as to the benefit of CENVAT just as a normal import which is suffering duty is also unavailable for the very same reasons, also since the rules/procedures/ conditions governing normal import compared to the one under Advance Authorization may vary because of the nature of import.

11. **The import which would have normally suffered duty having escaped due to the Advance Licence, but such import being a conditional one which ultimately stood unsatisfied, naturally loses the privileges and the only way is to tax the import.** The governing Notification No. 18/2015 (supra), paragraph 2.35 of the FTP which requires execution of bond, etc., in case of non-fulfilment of export obligation and paragraph 4.50 of the HBP read together would mean that the Legislature has visualized the case of non-fulfilment of export obligation, which drives an assessee to paragraph 4.50 of the HBP whereby the payment of duty has been prescribed in case of *bona fide* default in export obligation, which also takes care of voluntary payment of duty with interest as well. Admittedly, the inputs imported have gone into the manufacture of goods meant for export, but the export did not take place. **At best, the appellant could have availed the Cenvat credit,**

> **but that would not *ipso facto* give them any right to claim refund of such credit in cash with the onset of GST because CENVAT is an option available to an assessee to be exercised and the same cannot be enforced by the CESTAT at this stage."**
>
> **(emphasis supplied)**

61. The view taken by the learned Member in this decision is clearly contrary to the view expressed by the Larger Bench of the Tribunal in **Bosch Electrical**.

62. Learned counsel for Shakti Pumps has, however, placed reliance upon the several Division Bench decisions of the Tribunal wherein refund of CENVAT credit in cash has been granted.

63. In **Granules India Ltd.** vs. **Commissioner of Central Tax Hyderabad**[16], the Division Bench after placing reliance upon the Larger Bench decision of the Tribunal in **Bosch Electrical** held:

> "12. Having considered the rival contentions, we find that the payment of CVD and SAD subsequently during the GST regime, for the imports made under advance authorisation prior to 30.06.2017 is not disputed. **It is also not disputed that the Appellant have paid the CVD and SAD during the period August 2018 to March 2019, by way of regularisation of the shortfall in fulfilment of export obligation.** We find that Section 142(3) read with 142(5) of the GST act, provides that every claim for refund 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 the 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 provision of sub-section (2) of section 11B of the Central Excise Act (unjust enrichment).

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16. 2024 (2) TMI 1375 – CESTAT Hyderabad

> 13. **Further from a conjoint reading of subsection (3) (5) and (8A) of Section 142 of the CGST Act it is evident than that an assessee is entitled to claim refund of CVD and SAD paid after the appointed day, under the existing law, and such claim has to be disposed of according to the provisions of the existing law. As the Appellant was admittedly entitled to Cenvat credit of the said amount of Rs. 3,28,75,733/-, which is now no longer available due to implementation of GST regime, it is held that they are entitled to refund of the said amount.**"
>
> **(emphasis supplied)**

64. In **Commissioner of Central Excise & Service Tax, Ahmedabad-I** vs. **Aculife Healthcare Private Limited**[17], the Division Bench observed:

> **"**5. We find that the department sought to deny the refund of CVD and SAD paid by the appellant only on the ground that at the time of payment of CVD and SAD there was no provision of availing the Cenvat credit, therefore, it was alleged that the appellant was not in position to avail the Cenvat credit, therefore consequently even refund of the amount which is not cenvatable could not have been claimed. **We find that the appellant have paid the CVD and SAD for the period prior to 01.07.2017 even though the payment was made subsequent to 01.07.2017. Therefore, since the duty is paid by the appellant are for the period when the Cenvat credit Rules was existing, the appellant were entitled for Cenvat credit during period prior to 01.07.2017.** In CGST Act to deal with situation of the present case, special provision was made under Section 142(3) whereby when the assessee is not in a position to avail the Cenvat credit or utilize the same due to effect of GST regime from 01.07.2017 refund provision was enacted which specifically deals with the situation of refund of amount which is cenvatable as per existing law i.e. Central Excise Act, 1944 and Rules made

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17. 2024-VIL-474-CESTAT-AHM-CE

> thereunder. In the present case, the refund was made under the existing law i.e. section 11B of Central Excise Act, 1944 accordingly, the refund of SAD/CVD paid by the appellant which was cenvatable at the time when the said duty was payable, It is clearly eligible for refund under Section 11B read with Section 142(3) of CGST Act, 2017. **Therefore, in our considered view, the appellant are legally entitled for the refund of CVD/ SAD.** As regard the judgments relied upon by the appellant as well as the Revenue, we find that the Revenue has filed the appeal on the sole ground that the adjudicating authority has rejected the claim relying on the Single Member Bench decision in the case of this Tribunal decision in the case of Sarvo Packaging Ltd. There are number of judgments by this Tribunal itself which are contrary to the decision of Sarvo Packaging Limited 2020 (373) ELT 550 (Tri. Chennai). Moreover, even after considering the Sarvo Packaging Limited decision (supra), the Tribunal's Single Member Bench in the case of Sri Chakra Polyplast India Private Limited (supra) after relying upon many other decision came to the conclusion that the appellant are entitled for the refund under Section 142(3) of CGST Act, therefore, the decision of Sarvo Packaging Limited stand departed. xxxxxxxxxx."
>
> **(emphasis supplied)**

65. The same view was also taken by the Tribunal in **(1) Kobe Suspension Co Pvt. Ltd.** vs. **Commissioner of Central Excise, Goods & Service Tax, Faridabad[18]; (2) M/s. JSW Steel Ltd.** vs. **Commissioner of Central Tax & Central Excise[19]; (3) M/s. Hindustan Equipments Private Limited** vs. **Commissioner of CGST & Central Excise, Indore[20]; (4) M/s. Mithila Drugs Pvt. Ltd.** vs. **Commissioner, Central Goods and Service Tax, Udaipur (Rajasthan)[21]; (5) Flexi Caps and Polymers Pvt. Ltd.** vs.

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18. 2024 (6) TMI 180 – CESTAT Chandigarh
19. Excise Appeal No. 20135 of 2021 decided on 31.05.2024
20. 2024 (6) TMI 245 – CESTAT New Delhi
21. 2022 (3) TMI 58 – CESTAT New Delhi

Commissioner, CGST & Central Excise-Indore[22]; and (6) M/s. Circor Flow Technologies India Private Ltd. vs. **Principal Commissioner of GST & Central Excise, Coimbatore[23]**.

66. The inevitable conclusion, therefore, that follows from the aforesaid discussion is that Shakti Pumps is entitled to cash refund of CENVAT credit on the amount of CVD and SAD paid even after 01.07.2017. The Commissioner (Appeals), therefore, committed no illegality in granting this relief to Shakti Pumps.

67. The present appeal that has been filed by the department to assail the order passed by the Commissioner (Appeals) would, therefore, have to be dismissed and is dismissed.

(Order Pronounced on **08.07.2024**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

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22. 2021 (9) TMI 917 – CESTAT New Delhi
23. 2022 (59) G.S.T.L. 63 (Tri. – Chennai)