

(2004) 03 AHC CK 0120

In the Allahabad High Court

Case No : Central Excise Reference No. 7 of 2002 Central Excise Reference under Section 35G (3) of the Salt Act, 1944 in the E/REF/115 of 1999-NB (DB) in Appeal No. E/341/98-NB (DB)

Ankur Steels Kurouli

APPELLANT

Vs

CEGAT and Others

RESPONDENT

Date of Decision : 31-03-2004

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35G(3)

Citation : (2005) 100 ECC 516 : (2005) 188 ELT 367

Hon'ble Judges : R.S. Tripathi, J;M. Katju, J

Bench : Division Bench

Advocate : A.P. Mathur, for the Appellant; S.P. Kesharwani, for the Respondent

Judgement

M. Katju, J.—This is a reference u/s 35G(3) of the Central Excise and Salt Act, 1944 in which the following questions have been referred to us for our opinion:

(i) Whether the Hon"ble Tribunal was justified in holding that deemed credit as per letter F. No. Ts/36/94-TRU dated 1.3.94 can be denied on the ground that the Inputs (rerollable material like old and used rails, wheels, crossties, sleepers etc.) were clearly recognizable as non-duty paid when the deemed credit order dated 1.3.94 did not contain such a clause (stipulation);

(ii) Whether an item which has already suffered excise duty is required to suffer excise duty again by passage of time without any change in the nature and character of that particular item;

(iii) Whether the Superintendent is the competent authority under the Excise Act to recover the Modvat Credit wrongly availed of; and

(iv) Whether the facts and ratio of the case of Machine Builders and Ors. v. Collector of Central Excise is applicable in the case of the applicants."

2. Heard learned counsel for the parties Shri A.P. Mathur for the assessee and

Shri S.P. Kesharwani for the department.

3. In the manufacture of M.S. Bars and Rods falling under Chapter 72 of the Schedule to the Central Excise Tariff Act, 1985 the assessee is using re-rollable materials of Mild Steel in the manufacture of the final product. The assessee availed the benefit of deemed credit order dated 17.7.1992, but thereafter a show cause notice was issued by the Central Excise Department seeking to recover the amount of deemed credit on the ground that the re-rollable materials on which credit has been taken was not clearly recognizable as duty paid.

4. The Assistant Commissioner dropped the proceedings but the department reviewed the order u/s 35E(2) of the Central Excise Act, and the Commissioner (Appeals) held that the deemed credit was not available on the ground that Railway Scrap (re-rollable material) was clearly recognizable as non-duty paid.

5. The assessee filed an appeal before the CEGAT, and the CEGAT by its order dated 4.12.1998 dismissed the appeal on the ground that no duty has been paid on the unserviceable Rail material. Hence, the benefit of deemed credit was not available to the assessee. The assessee's reference application u/s 35G(1) was also dismissed by the Tribunal by its order dated 11.8.2000 on the ground that the deemed credit order was issued under Rule 57G of the Central Excise Rules which provides that the Central Government may direct that with effect from a specified date, all stocks of the said inputs in the country, except such stocks lying in the Factory, Customs area or a Warehouse as are clearly recognizable as non-duty paid, may be deemed to be duty paid and credit of duty in respect of the inputs may be allowed on such rate and subject to such conditions as the Government may direct without production of documentary evidence of payment of duty provided that manufacturer takes reasonable steps to ensure that the inputs acquired by him are goods on which the appropriate duty as indicated in the document accompanying the goods had been paid.

6. Thereafter an application u/s 35G(3) was filed on which the High Court directed this reference to be made.

7. The assessee purchases unserviceable railway material from the Railways, i.e. the MS scrap of condemned locomotives, scrap wheels, rails, covers, plate cutting etc.

8. Learned counsel for the assessee submitted that the Railways at the time of purchase of these goods paid central excise duty leviable on such goods. These rail materials after being used for some time became unserviceable and were auctioned by the Railways. The assessee purchased this rail material in an auction, and it is alleged that at the time of the auction no duty was payable on such materials.

Learned counsel for the assessee submitted that by Central Government order dated 12.7.1998 on deemed Modvat Credit there is no condition of payment of duty. The G.O. only stipulates three conditions and on satisfying these conditions

the deemed credit is available on re-rollable material of iron or steel.

Learned counsel for the assessee submitted that the conditions of the deemed credit were satisfied in the present case, and hence the benefit should be granted to the assessee.

9. On the other hand learned counsel for the department submitted that it is admitted by the assessee that no duty was paid on the unserviceable rail materials. Hence, the inputs in question are clearly non-duty paid. The Tribunal has relied on the Larger Bench decision of the Tribunal in the case of *Machine Builders v. Collector of Central Excise*, 1996 (12) RLT 817. In that decision it was held in Para 17 that the words "non-duty paid" have to be interpreted in the plain and literal sense. They do not require that there must be some duty payable on the goods under the Schedule to the Tariff Act, and that the same has not been paid for some reason. In the opinion of the Tribunal there is no such requirement that some duty must be payable, and the same has not been paid for some reason. If duty has not been paid on the inputs it is a clear case of duty not having been paid irrespective of whether any duty was leviable on the goods or not.

10. The Tribunal was of the view that since it has been admitted by the assessee that no duty has been paid on the unserviceable railway material the assessee is not entitled for deemed Modvat Credit. The Tribunal also relied on its earlier decision in the case of *Ravi Steels v. CCE* dated 4.2.1997:

"Rule 57G of the Central Excise Rules states -- Procedure to be observed by the manufacturer -- (1) Every manufacturer intending to take credit of the duty paid on inputs under Rule 57A, shall file a declaration with the Assistant Collector of Central Excise having jurisdiction over his factor, indicating the description of the final products manufactured in his factory and the inputs, intended to be used in each of the said final products and such other information as the said Assistant Collector may require, and obtain a dated acknowledgment of the said declaration.

(2) A manufacturer who has filed a declaration under sub-rule (1) may, after obtaining the acknowledgment aforesaid, take credit of the duty paid on the inputs received by him:

[Provided that no credit shall be taken unless the inputs are received in the factory under the cover of a Gate Pass, an AR I, a Bill of Entry or any other document as may be prescribed by the Central Board of Excise and Customs [constituted under the Central Boards of Revenue Act, 1963 (54 of 1963)] in this behalf evidencing the payment of duty on such inputs:]

Provided further that having regard to the period that has elapsed since the duty of excise was imposed on any inputs, the position of demand and supply of the said inputs in the country and any other relevant considerations, the Central Government may direct that with effect from a specified dated, all stocks of the

said inputs in the country, except such stocks lying in a factory, customs area [as defined in the Customs Act, 1962 (52 of 1962)] or a warehouse as are clearly recognizable as being non-duty paid, may be deemed to be duty-paid and credit of duty in respect of the said inputs may be allowed at such rate and subject to such conditions as the Central Government may direct, without production of documents evidencing the payment of duty:

Provided also that the manufacturer shall take all reasonable steps to ensure that the inputs acquired by him are goods on which the appropriate duty as indicated in the documents accompanying the goods has been paid."

11. The controversy involved in the instant reference is with regard to availability of deemed Modvat Credit under Rule 57G(2) of the Central Excise Rules, 1944 which provides that no credit shall be taken unless the inputs are received in the factory under the cover of a Gate Pass, an AR I; a Bill of entry or any other document as may be prescribed by the Central Board of Excise and Customs in this behalf evidencing the payment of duty on such inputs. The second proviso to Rule 57G(2) of the Rules provides that having regard to the period that has elapsed since the duty of excise was imposed on any inputs, the Central Government may direct that w.e.f. a specified date stocks of the said inputs in the country may be deemed to be duty paid. In respect of said inputs Modvat Credit may be allowed at such rate and subject to such conditions as the Central Government may direct without production of documents evidencing the payment of duty. This third proviso to Rule 57G(2) further imposes a restriction/responsibility that the manufacturer shall take all reasonable steps to ensure that the inputs acquired by him are goods on which the appropriate duty as indicated in the documents accompanying the goods, has been paid.

12. In exercise of the aforesaid provisions of Rule 57G(2) of the Rules the Central Government has issued order dated 1.3.1994 directing that Modvat Credit may be allowed @ 920 per M.T. without production of documents evidencing the payment of duty. This Government Order does not direct for allowing deemed Modvat Credit in respect of inputs on which no duty has been paid. In paragraph 8 of its order the Tribunal has recorded a finding of fact that "It is admitted by the Appellant that no duty has been paid on unserviceable raid material". Thus, in our opinion the matter is concluded by a finding of fact and hence in our opinion no Modvat Credit is available to the applicant.

13. Further a bare perusal of the aforesaid provision of deemed Modvat Credit under Rule 57G(2) clearly shows that for availing the Modvat Credit the inputs must be clearly recognizable as duty paid and must be received in the factory under the cover of a gate pass etc. However, the documents evidencing the payment of duty may not be required to be produced. Thus, the settled principle of availing the Modvat Credit remains unaffected inasmuch as the inputs must be duty paid so as to claim Modvat Credit. If any interpretation contrary to this is accepted then the provision itself may become ultra vires inasmuch as a manufacturer may become entitled to realize excise duty on the final product and

keep in his pocket the amount relating to deemed Modvat Credit without any duty paid on inputs. It shall also result in permitting unjust enrichment.

14. In *Collector of Central Excise, Vadodra Vs. Dhiren Chemical Industries*, the Supreme Court observed (vide Paras 6 to 8):

"As exemption notification that uses the said phrase applies to goods which have been made from duty paid material. In the said phrase, due emphasis must be given to the words "has already been paid". For the purposes of getting the benefit of the exemption under the notification, the goods must be made from raw material on which excise duty has, as a matter of fact, been paid, and has been paid at the "appropriate" or correct rate. Unless the manufacturer has paid, the correct amount of excise duty, he is not entitled to the benefit of the exemption notification.

Where the raw material is not liable to excise duty or such duty is nil, no excise duty is, as a matter of fact, paid upon it. To goods made out of such material the notification will not apply.

The notification is intended to give relief against the cascading of excise duty on the raw material and again on the goods made therefrom. There is no cascading effect when no excise duty is payable upon the raw material and the hardship that the notification seeks to alleviate does not arise."

15. In para 8 of the impugned order of the CEGAT dated 4.12.1998 a finding of fact has been recorded as follows:

"In the present case it is admitted by the appellant that no duty has been paid on unserviceable rail material."

16. Hence, the decision of the Supreme Court in *Vivek Re-Rolling Mills v. Collector of Central Excise*, 2002 (53) RLT 888 relied on by the assessee is distinguishable because in that decision it has been clearly stated (vide Para 2) "There is no dispute that the inputs have suffered the duty".

17. Learned counsel for the assessee has heavily relied upon the judgment of a learned Single Judge of this Court in *Laxmi Rolling Mills v. CEGAT*, 2002 (48) RLT 1. In that decision the learned Single Judge considered the notification dated 20.5.1988 issued under Rule 8(1) of the Central Excise Rules, 1944 (now Section 5A of the Act) which exempts goods of the specified description from excise duty if such final products are made from goods of specified description on its excise duty leviable under the Schedule has already been paid. Referring to the provisions to Section 3 of the Act and Rules 7 and 9 of the Rules the learned Single Judge held in para 10 of his judgment that the duty paid character shall be presumed or deemed to be inputs on which the duty has already been paid.

18. In our opinion, the view taken by the learned Single Judge is contrary to the decision of the Constitution Bench of the Supreme Court in *Collector of Central Excise v. Dhiren Chemical Industries* (supra) which has already been discussed

above.

19. Merely because an SLP has been dismissed against the judgment of the learned Single Judge that does not mean that the judgment of the learned Single Judge has merged into the judgment of the Supreme Court vide *Kunhayammed v. State of Kerala*, 2000 (72) ECC 681 (SC) : 2001 (6) SCC 359 and *Carjaire Equipments India Pvt. Ltd. v. Ministry of Finance*, 2004 UPTC 252.

20. Moreover, the view of a smaller Bench of the Supreme Court cannot prevail over the view of a Constitution Bench of the Supreme Court. Also the judgment of the learned Single Judge as well as in *Vivek Re-Rolling Mills v. Collector of Central Excise* (supra) related to an exemption notification and not Modvat Credit.

21. In *Upper India Steel Mfg. and Engg. Co. Ltd. Vs. Union of India (UOI)*, the Punjab and Haryana High Court considered the second and third provisos to Rule 57G(2) and observed:

"Keeping in view the basic intention of the Government in introducing the Modvat Scheme as also the purport of the Rules, it appears clear to us that the generator rule was that no credit could be claimed by the industry with regard to the duty on the inputs unless there was evidence regarding the "payment of duty" thereon..... The rule introduced a very limited fiction. It was not intended to authorise the manufacturer to collect excise duty instead of paying it. The power to collect taxes is that of the State for it acts for the benefit of the entire country. The industry is obliged to pay the excise duty."

22. While considering a provision of exemption under the Punjab General Sales Tax, 1948, the Supreme Court in the case of *Amrit Vanaspati Co. Ltd. and Anr. v. State of Punjab and Anr.*, 1992 UPTC 593-vide paragraphs 10, 11, 12 and 13, observed;

"Therefore, even a Legislature, much less a Government, cannot enact a law or issue an order or agree to refund the tax realized by it from people in exercise of its sovereign powers, except when the levy or realization is contrary to a law validly enacted. A promise or agreement to refund tax which is due under the Act and realized in accordance with law would be fraud on the constitution and breach of faith of the people."

23. In *Upper India Steel Mfg. and Engg. Co. Ltd. Vs. Union of India (UOI)*, the Punjab and Haryana High Court held that the purpose of Modvat was not to unduly enrich the industry. It was introduced to regulate the procedure for collection and to avoid payment of duty on duty, but it appears to have been turned into a process of collection of duty by the industry. Such could not have been the intention of the Central Government.

24. In 1996 (64) ECR 1 00 a Larger Bench of the CEGAT held that the facility of deemed credit is available only to inputs which have suffered duty and where it may not be possible to produce documents evidencing payment of duty. Inputs not suffering duty, for whatever reason, are not eligible for deemed credit facility.

We fully agree with the view of the Tribunal in the case of Machine Builders v. Collector of Central Excise (supra)

25. In Jayesh Containers Vs. Collector of Central Excise, Baroda and Others, the Supreme Court held that the burden is on the assessee to show that he is entitled to the exemption. In the present case the assessee is not able to show that he has paid duty on the unserviceable railway material which he purchases from the Railways, rather the Tribunal has found that the said material is not duty paid. Hence, the assessee is not able to discharge his burden.

26. Hence, we answer the questions referred to us as follows;

Question No. 1 is answered in the affirmative as it has been held that no duty has been paid on the unserviceable railway material. This is a finding of fact and we cannot interfere with the same in this reference.

As regards question No. 2, the same does not arise in view of our answer to question No. 1.

As regards question No. 3, it appears that this does not arise out of the Tribunal's order as there is no discussion on it in the Tribunal's order. Hence, this question was wrongly called by the Court and we return this question as unanswered on the ground that it does not arise out of the Tribunal's order.

27. It may be mentioned the expression "question of law arising out of such order" mentioned in Section 35G(1) has to be given the same interpretation as the analogous provision in Section 256(1) of the Income Tax Act. There are a catena of decisions on Section 256(1) of the Income Tax Act which have held that unless a question is discussed in the Tribunal's order it cannot be said to arise out of that order. (See in this connection Kanga and Palkhivala's The Law and Practice of Income Tax, Seventh Edition page 1160)

28. In CIT v. Scindia Steam Navigation Co. Ltd. 42 ITR 598 the Supreme Court observed that a question of law can be said to arise out of the Tribunal's order only if it is dealt with by the Tribunal or is raised before though not decided by the Tribunal. A question of law not raised before the Tribunal and not dealt with by it in its order cannot be said to arise out of its order even if on the facts of the case stated in the order the question fairly arises vide T.D. Kumar and Brothers (P.) Ltd. Vs. Commissioner of Income Tax, Calcutta, etc.

29. Moreover, even on merits we are of the opinion that this question has to be decided against the assessee because the show cause notice was issued by the Superintendent Central Excise under Rule 57(1) of the Central Excise Rules which provides for issuance of notice by a proper officer for recovery of credit wrongly availed of or utilized in an improper manner. The show cause notice was adjudicated upon by the Assistant Commissioner, Central Excise by order dated 27.8.1996 and the Modvat Credit was allowed to the assessee. The Department filed appeal before the Commissioner (Appeals) which was allowed on 19.11.1997 and against this order the assessee's appeal was dismissed by the CEGAT. The

question of jurisdiction about the show cause notice was not raised by the assessee rather he submitted to this jurisdiction. Hence, in our opinion he cannot raise it now in this reference.

30. Moreover, Rule 2(14) of the Central Excise Rules which defines the term "proper officer" clearly includes the Superintendent who issues the show cause notice as he was having territorial jurisdiction with regard to the manufacturing premises of the petitioner. Hence, the Superintendent as well as the Assistant Commissioner are both the proper officers.

31. As regards the last question referred we have already observed that we are in agreement with the view taken by the Larger Bench of the Tribunal in the case of *Machine Builders v. Collector of Central Excise* (supra). We have carefully perused the said decision, and we are fully in agreement with the reasoning contained therein, and hence we are not repeating the same.

32. The reference is answered accordingly, in favour of the department and against the assessee.