

(2011) 08 RAJ CK 0141
In the Rajasthan High Court
Case No : Civil Writ Petition No. 11870 of 2009

Arihant Tiles and Marbles Pvt. Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 16-08-2011

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35B(1)
Income Tax Act, 1961 — Section 2(29BA), 80IA, 80IA(2)(iii)

Citation : (2012) 281 ELT 692 : (2012) 1 RLW 340

Hon'ble Judges : Arun Mishra, C.J.;Alok Sharma, J

Bench : Division Bench

Advocate : M.S. Singhvi, Assisted by Akhilesh Rajpurohit and Vineet Dave, for the Appellant; Vineet Mathur and Ravi Bhansali, for the Respondent

Final Decision : Dismissed

Judgement

1. The writ petitions have been preferred questioning the order dated 2-9-2009 passed by the Govt. of India in revision and also for quashing the Order dated 25-4-2006 passed by the Commissioner, Central Excise, the Order dated 30-4-2007 passed by the Dy. Commissioner, Central Excise and the Order dated 26-9-2007 passed by the Commissioner (Appeals) in the matter of claim of Cenvat credit by the petitioner with respect to marble and granite. Petitioner has claimed that the process of cutting and polishing the granite and marble amount to manufacturing process falling within Chapter 25 of the Central Excise Tariff Act, 1985, hereinafter referred to as "the Act of 1985". The facts in all the writ petitions are similar, therefore, the facts in brief from one of the writ petitions viz., D.B. Civil Writ Petition No. 11870/2009 are being noted. It is averred that petitioner is a private limited company and is engaged in the business of sawing of marble blocks into slabs and tiles for sale in both indigenous and foreign market. The marble blocks are excavated by the mine owners in raw uneven shapes, which have to be properly sorted out and marked. Such blocks are then processed on single blade/wire saw machines using advanced technology to square them by separating waste material. Squared up blocks are sawned for

making slabs by using the gang saw machine or single/multi block cutter machine. There, the sawn slabs are further reinforced by way of filling cracks by epoxy resins and fiber netting. The slabs are polished on polishing machine and then slabs are further edge cut into required dimensions/tiles as per market requirement in perfect angles by edge cutting machine and multi disc cutter machines. Finally, the polished slabs and tiles are buffed by shiner. Petitioner is also engaged in the business of purchasing rough granite slabs and out of them manufacturing cut and sized polished tiles. The machinery has cost the petitioner a sum of Rs. 750 lacs. Petitioner has claimed that the marble slabs and tiles manufactured fall under Chapter 25 of the Act of 1985 and the granite tiles produced fall under Chapter 68 of the Act of 1985. As per the Circular No. 3/92 issued by the Central Board of Excise & Customs on 22-6-1992, the marble slabs have been held to be dutiable. In accordance with the provisions contained in the Central Excise Act, 1944, hereinafter referred to as "the Act of 1944", and the Cenvat Credit Rules, 2002, hereinafter referred to as "the Rules of 2002" and the Cenvat Credit Rules, 2004, hereinafter referred to as "the Rule of 2004" petitioner has been availing the benefit of Cenvat credit accrued on receipt of capital goods, which has been utilised while clearing its finished goods. Petitioner had sought the clarification from the Excise Department on 19-9-2002. The Assistant Commissioner vide letter dated 10-10-2002 confirmed the entitlement of the petitioner to avail the Cenvat credit in respect of the capital goods. Consequently, the petitioner utilized the Cenvat credit.

2. The Apex Court has considered the matter regarding the applicability of the Central Excise on marble slabs and tiles in Aman Marble Industries Pvt. Ltd. Vs. Collector of C. Ex., and laid down that the cutting of marble blocks into slabs does not amount to manufacture, therefore, the Central Excise duty was not payable in respect of marble slabs and tiles.

3. Before 18-9-2003, the department as well as the petitioner were considering the slabs and tiles of marble as an excisable product and the petitioner was paying excise duty on foreign consumption. The position continued even after 18-9-2003. The petitioner presented a claim for refund of amount of Rs. 4,37,685/- covering the period of July 2004. The application was granted vide Order dated 12-5-2005 (P/8) passed by the Assistant Commissioner, Central Excise Division, Udaipur. However, the Commissioner Central Excise, vide his Order dated 25-4-2006 reviewed the Order dated 12-5-2005 passed by the Assistant Commissioner holding the same to be illegal. Simultaneously, a show cause notice was issued by the Deputy Commissioner on 9-5-2006 calling upon the petitioner to show cause as to why an amount of Rs. 4,37,229/- be not recovered. Petitioner submitted reply to the show cause notice dated 9-5-2006 (P/11). The Deputy Commissioner, Central Excise vide this Order dated 30-4-2007 confirmed the demand made by the show cause notice dated 9-5-2006. Being aggrieved by the order dated 30-4-2007, the appeal was preferred before the Commissioner (Appeals), who by order dated 26-9-2007 rejected the appeal filed by the petitioner. The Commissioner (Appeals) allowed

the appeal filed by the department as against the Order dated 12-5-2005 passed by the Assistant Commissioner, Central Excise Division, Udaipur, vide Order dated 31-8-2006 and the Order dated 12-5-2005 was set aside. The revision petition was preferred by the petitioner against the Order dated 26-9-2007, which was registered as Revision Petition No. 195/23/08-RA. The same has been dismissed vide Order dated 2-9-2009.

4. Petitioner has submitted that the Central Government could not have proceeded to reject the revision as the issue was with respect to the claim of rebate made by the petitioner after the decision of the Apex Court in Aman Marble Industries (P) Ltd.'s case (supra). Petitioner has also relied upon the decision in its own case of the Apex Court in Income Tax Officer v. M/s. Arihant Tiles & Marbles (P) Ltd., Civil Appeal No. 8036/2009 (P/19), decided by the Apex Court on 2-12-2009 [Income Tax Officer, Udaipur Vs. Arihant Tiles and Marbles (P) Ltd.,]. Thus, the petitioner has submitted that the decision rendered by the Apex Court holds the field and the aforesaid process has been held to be of manufacture or production u/s 80IA of the Income Tax Act. On the same parity of reasonings, the rebate is required to be given to the petitioner, as the process amounts to manufacture. It is also submitted that the right to avail Cenvat credit as per Rule 4(2) is a vested right, thus, the orders passed by the Commissioner, Central Excise and the Govt. of India are bad in law and they are liable to be quashed. The revisional authority has committed error in holding that no Cenvat credit was available to the petitioner after 18-9-2003. This finding is contrary to the record. Once the Cenvat credit became available to the petitioner, it was entitled to avail the same in accordance with the rules.

5. The stand of the respondents is that the decision of the Apex Court in the case of Aman Marble Industries (P) Ltd.'s case (supra) holds the field. Under the Cenvat Credit Rules, 2002, a manufacturer can avail credit only on capital goods, which are used in the factory for manufacture of the final product. As per Rule 2(b), the final product means excisable goods manufactured or produced from the inputs. Since the marble slabs after the decision of Aman Marble (supra) became non-excisable, the same is not covered under the definition of final product. Thus, the petitioner cannot utilize the credit lying in the balance, since there is no vested right in it to avail the same. The rebate of Rs. 4,37,685/- is not admissible. Petitioner was not enjoying the benefit of excise thereafter in respect of marble slabs and tiles. The decision in the case of Samtel India Ltd. Vs. Commissioner of Central Excise, Jaipur, is not applicable in the instant case. The item in the instant case was non-excisable in view of the decision of the Apex Court in Aman Marble (supra), thus, the balance of credit lying on 17-9-2003 stood lapsed. Petitioner could not have utilized the credit towards payment of duty on other goods i.e. granite slabs in the instant case, which could not have been exported in order to encash credit, which was not admissible to them. Petitioner did not submit any evidence that they exported marble slabs and tiles after 18-9-2003. The process of cutting marble slabs and tiles does not amount to manufacture.

6. Mr. M.S. Singhvi, learned Sr. Advocate, has submitted that in view of the decision of the Apex Court in Income Tax Officer, Udaipur v. M/s. Arihant Tiles & Marble's case (supra) in which the process has been held to be of manufacture or production. Consequently, the decision in Aman Marble's case (supra) cannot be said to be applicable, as the decision in the petitioner's own case of the Apex Court in Income Tax Officer, Udaipur v. M/s. Arihant Tiles & Marble's case (supra), is squarely attracted. He further submitted that in Income Tax Officer v. M/s. Arihant Tiles & Marble's case (supra) in the case of the assessee itself, the decision of the Apex Court in Aman Marble's case (supra) has been held to be not applicable. Learned counsel has submitted that in view of Cenvat Credit Rules, the vested right could not have been taken away. It was open to the petitioner to avail the benefit of Cenvat credit and it was given. He has further relied upon the decision of Commissioner of Central Excise passed on 13-5-2005 (P/18) in which the Cenvat credit was allowed after referring to the decision of the Aman Marble's case (supra).

7. Mr. Vinit Mathur, learned counsel for the respondents, has submitted that their lordships of the Supreme Court in Income Tax Officer v. M/s. Arihant Tiles and Marble's case (supra), considered the definition of "manufacture" or "production" within the purview of Section 80-IA(2)(iii) of the Income Tax Act and other provisions, same has been held to be wider in its scope as compared to the definition of "manufacture" in the Excise Act, which came up for consideration in Aman Marble's case (supra), thus, the credit could not have been availed, present one is not the case u/s 80IA of the Income Tax Act but is governed by the Central Excise Act read with Central Excise Tariff Act and the Cenvat Credit Rules. It is further submitted that the finding has been recorded by the Govt. of India in its order that there was no stock of capital goods lying unutilized and finished goods became exempt after the pronouncement of the judgment in Aman Marble's case (supra) in 2003. He has further submitted that in view of the finding, there is no question of taking away the vested right. The decision in the case of Aman Marble (supra) is clearly attracted.

8. The main question for consideration is whether the process of cutting of marble slabs amounts to process of manufacture?

9. The Apex Court in Aman Marble Industries (P) Limited's case (supra) has laid down that cutting of marble blocks into marble slabs does not amount to manufacture. While laying down so, the reliance has been placed by the Apex Court on the decision in Rajasthan State Electricity Board Vs. Associated Stone Industries and Another, , in which it is laid down that excavation of stones from a mine and thereafter cutting them and polishing them into slabs did not amount to manufacture of goods. The Apex Court in Aman Marble has laid down thus:

4. In Rajasthan SEB v. Associated Stone Industries, such a question fell for consideration before the Court although on a different context and this Court held as follows : (SCC p. 146, para 12).

This apart, excavation of stones from a mine and thereafter cutting them and polishing them into slabs did not amount to manufacture of goods. The word "manufacture" generally and in the ordinary parlance in the absence of its definition in the Act should be understood to mean bringing to existence a new and different article having a distinctive name, character or use after undergoing some transformation. When no new product as such comes into existence, there is no process of manufacture. Cutting and polishing stones into slabs is not a process of manufacture for the obvious and simple reason that no new and distinct commercial product came into existence as the end product still remained stone and thus its original identity continued.

And this position was further reiterated as follows : (SCC pp. 147-48 para 16)

It is also not possible to accept that excavation of stones and thereafter cutting and polishing them into slabs resulted in any manufacture of goods.

5. In the light of this decision we have no hesitation in holding that the activity carried on by the appellant does not amount to manufacture. We set aside the order passed by the Tribunal and allow this appeal.

10. In our considered opinion, the case of Income Tax Officer v. M/s. Arihant Tiles & Marbles (P) Ltd.'s case (supra) cannot be pressed into service as the same is quite distinguishable. Their lordships of the Supreme Court have also distinguished the decision of Aman Marble Industries (P) Limited's case (supra) in Income Tax Officer v. M/s. Arihant Tiles & Marble (P) Ltd.'s case (supra) in the case of the assessee itself. Their lordships have laid down that the question in Aman Marble Industries Pvt. Ltd.'s case (supra) was not with respect to connotation of the word "production" under Sec. 80IA of the Income Tax Act, which has a wider meaning as compared to the word "manufacture" in the Excise Act. The Apex Court in ITO v. Arihant Tiles has considered the question thus :

In the case of Aman Marble Industries Pvt. Ltd. Vs. Collector of C. Ex., , the question that arose for consideration was whether cutting of marble blocks into marble slabs amounted to manufacture for the purpose of Central Excise Act. At the outset, we may point out that in the present case, we are not only concerned with the word "manufacture", but we are also concerned with the connotation of the word "production" in Section 80IA of the Income Tax Act, 1961, which, as stated hereinabove, has a wider meaning as compared to the word "manufacture". Further, when one refers to the word "production", it means manufacture plus something in addition thereto. The word "production" was not under consideration before this Court in the case of Aman Marble Industries Pvt. Ltd. (supra). Be that as it may, in that case, it was held that "cutting" of marble blocks into slabs per se did not amount to "manufacture". This conclusion was based on the observations made by this Court in the case of Rajasthan State Electricity Board (supra). In our view, the judgment of this Court in Aman Marble Industries Pvt. Ltd. (supra) also has no application to the facts of the present case. One of the most important reasons for saying so is that in all such cases,

particularly under the Excise law, the Court has to go by the facts of the activity undertaken by an assessee. Mere extraction of stones may not constitute manufacture. Similarly, after extraction, if marble blocks are cut into slabs per se will not amount to the activity of manufacture.

In the present case, we have extracted in detail the process undertaken by each of the respondents before us. In the present case, we are not concerned only with cutting of marble blocks into slabs. In the present case we are also concerned with the activity of polishing and ultimate conversion of blocks into polished slabs and tiles. What we find from the process indicated hereinabove is that there are various stages through which the blocks have to go through before they become polished slabs and tiles. In the circumstances, we are of the view that on the facts of the cases in hand, there is certainly an activity which will come in the category of "manufacture" or "production" u/s 80IA of the Income Tax Act. As stated hereinabove, the judgment of this Court in Aman Marble Industries Pvt. Ltd. was not required to construe the word "production" in addition to the word "manufacture". One has to examine the scheme of the Act also while deciding the question as to whether the activity constitutes manufacture or production. Therefore, looking to the nature of the activity stepwise, we are not (sic) produce any new product whereas it was argued on behalf of the assessee that it did produce a distinct new product. The view expressed by the High Court that the activity in question constituted "production" has been affirmed by this Court in Sesa Goa's case saying that the High Court's opinion was unimpeachable. It was held by this Court that the word "production" is wider in ambit and it has a wider connotation than the word "manufacture". It was held that while every manufacture can constitute production, every production did not amount to manufacture.

In our view, applying the test laid down by this Court in Sesa Goa's case (supra) and applying it to the activities undertaken by the respondents herein, reproduced hereinabove), it is clear that the said activities would come within the meaning of the word "production".

11. It is apparent from the discussion made by their lordships of the Apex Court that the decision in Aman Marble Industries Pvt. Ltd.'s case (supra) has been held to be not applicable to the facts of the said case. The Apex Court has also held that one of the most important reasons for saying so is that in all such cases, particularly under the Excise Law, the Court has to go by the facts of each case. In case, one has to examine the nature of the activity undertaken by an assessee. Their lordships also observed that mere extraction of stones does not constitute manufacture. Similarly, after extraction, if marble blocks are cut into slabs per se it will not amount to the activity of manufacture. In the facts of the case, considering the provisions of Section 80IA and definition of manufacture under Sec. 2(29BA) of the Income Tax Act, their lordships have held that the "production" which is defined under Sec. 80IA of the Income Tax Act, has a wider meaning as compared to the word "manufacture" and in that view of the matter,

it has been held by their lordships that the activity meant to "manufacture" or "production" u/s 80IA of the Income Tax Act. The dictum of the Apex Court is in the context of Section 80IA of the Income Tax Act but considering the definition of "manufacture" in the Excise Act in the case of Aman Marble Industries (P) Ltd."s case (supra) and particularly in view of the fact that the decision in Aman Marble has not been held to be bad law by their lordships of the Apex Court in Income Tax Officer v. M/s. Arihant Tiles & Marble"s case (supra) squarely attracted to the facts of the instant case. The decision in the case of Income Tax Officer v. M/s. Arihant Tiles & Marbles (supra) cannot be said to be applicable.

12. Coming to the second submission raised by Mr. M.S. Singhvi, learned Sr. Advocate, that in view of the decision in Eicher Motors Limited and Another Vs. Union of India and Others Etc., , the petitioner was entitled to avail the benefit of Cenvat credit, we are of the view that no assistance can be derived from Eicher Motors Ltd."s case (supra), as the credit in the aforesaid decision was utilized on input, which was lying in the factory on 16-3-1995 either as parts or contained in finished products lying in stock on 16-3-1995. In the instant case, when the decision has been rendered by the Apex Court in Aman Marble"s case (supra) on 18-9-2003, the Government of India in its order (P/17), dated 2-9-2009 has found on facts that no stock of input was lying with the petitioner and the finished goods became exempted after the pronouncement of judgment of the Apex Court in the case of M/s. Aman Marbles in 2003. The following findings have been recorded in the impugned order by the Govt. of India;

11. The ratio of these judgments is not applicable in the instant case as there was no stocks on input lying unutilized with the applicant and the finished goods became exempted after the pronouncement of judgment of Hon"ble Supreme Court in the case of M/s. Aman Granite India Ltd. on 18-9-2003.

12. Govt. further observes that the question of lapse of Cenvat credit lying unutilized on 18-9-2003 was agitated before Addl. Commissioner, Jaipur, who vide his order-in-original No. 9/SE/JP II/2005, dated 17-3-2005 decided it in favour of the applicant. On a review application filed by the Commissioner, the Commissioner (Appeals) reversed the decision vide his order-in-appeal No. 472/HKS/CE/JP-II/2006, dated 23-8-2006 and held that the Cenvat credit lying in balance as on 18-9-2003 would lapse. Moreover, in his impugned orders-in-appeal, the Commissioner (Appeal) has relied upon the abovesaid order regarding lapsing of Cenvat credit. The order-in-Appeal No. 472/HKS/CE/JP-II/2006, dated 23-8-2006 is not under challenge before the Govt. of India in these revision applications as issue of Cenvat credit does not fall under the purview of Section 35EF read with proviso to Section 35B(1) of Central Excise Act, 1944. The order-in-appeal mentioned in para 1 of this order relating to rebate claim are under challenge in these revision applications. Since the issue regarding lapsing of Cenvat credit lying in balance as on 18-9-2003 is decided by the Commissioner (Appeal) against the applicant, the Cenvat credit balance stood lapsed and the Central Excise duty therefore cannot be treated as duty

paid from Cenvat credit.

13. Govt. further observes that as there was no Cenvat credit available with the applicant after 18-9-2003, so the goods cleared for export on reversal of unavailable Cenvat credit becomes goods cleared without payment of duty. Since no duty has been paid on the exported goods, there is no question of rebate claim under Rule 18 of the Central Excise Rules, 2002. So, Govt. finds no infirmity in the impugned order-in-appeal to interfere with.

13. In view of the aforesaid, we find that it was not open to the petitioner to avail Cenvat credit and there is no question of taking away any vested right in view of the aforesaid finding with respect to stock positions as on 18-9-2003.

Coming to next submission made by Mr. M.S. Singhvi, learned Sr. Advocate, based on the Cenvat Credit Rules, 2004, we are of the considered opinion that in view of the pronouncement of the Apex Court in Aman Marble's case (supra) after 18-9-2003, the Rule 4 of the Cenvat Credit Rules cannot come to the rescue of the petitioner, as the process in question itself does not amount to process of manufacture within the purview of Excise Law and Cenvat Credit Rules, 2004, the Rule 4 is inapplicable. Thus, the reliance upon Rule 4 of the Rules of 2004 is of no avail.

14. It was also submitted on behalf of the petitioner that Cenvat credit was to be utilized because the excise duty was recovered even after decision in Aman Marble's case (supra) on marble slabs. We are of the considered opinion that in view of the decision of the Apex Court in Aman Marble (supra), since the process does not amount to process of manufacture, the aforesaid action cannot clothe the entitlement to the petitioner to claim the Cenvat credit, that would amount to violating the mandate of the Apex Court.

15. It was lastly submitted on behalf of the petitioner relying upon the decision of the Assistant Commissioner, Central Excise Division dated 12-5-2005 that benefit had been granted of Cenvat credit considering decision in Aman Marble (supra). The submission has no legs to stand, as the period in question was before the decision rendered in Aman Marble (supra) as noted in our order itself. Moreover, order cannot be cited as a precedent. Apart from that the decision related to the period before the decision in Aman Marble's case. Thus, it renders no help and does not at all espouse the cause of the petitioner. Thus, we find the orders, which have been passed reviewing the order dated 12-5-2005 and other orders, which have been impugned to be in accordance with the decision of the Apex Court in Aman Marble (supra).

In view of the aforesaid, we are of the considered opinion that no ground is made out so as to make interference in the orders passed by the Commissioner and Government of India.

Resultantly, all the writ petitions are hereby dismissed. No costs.