(2002) 03 DEL CK 0096

In the Delhi High Court

Case No : C.E.A. No. 4 of 2001

Auto and General Industries APPELLANT

Vs

Northern Bench, Customs Excise and Gold (Control) Appellate Tribunal and Others RESPONDENT

Date of Decision : 20-03-2002

Acts Referred:

Citation : (2002) 8 AD 106 : (2002) 62 DRJ 427 : (2002) 82 ECC 27 : (2002) 143 ELT 487

Hon'ble Judges : Vikramajit Sen, J;Dalveer Bhandari, J

Bench : Division Bench

Advocate : Sudhir K. Makkar, for the Appellant; Naveen Chawla, for the Respondent

Judgement

Dalveer Bhandari, J.—This is an application u/s 35(G)(3) of Central Excise & Salt Act, 1944 before this Court against Reference Order No. R/34/99-NB(DB) dated 27.10.1999 bearing File No. E\\2350/93-NB(DB) passed by the Customs, Excise & Gold (Control) Appellate Tribunal.

2. The Tribunal incorporated the following questions of law arising out of the Final Order No. A/947/97-NB dated 5.9.1997:

"Where the statement of the representatives of M/s. Baldev Metal Pvt. Ltd., M/s Bharat Alloy Cast. Co., M/s. Metal Cast, M/s. Simplex Traders remain uncorroborated by any material evidence on record, whether it is correct to hold that aluminium ingots and zinc alloy ingots supplied by these suppliers on the strength of their invoices, are non-duty paid or having been cleared at Nil rate of duty and thereby disallowing the MODVAT credit on deemed credit basis to the appellants in terms of Government order F.No. 342/1/88-TRU dated 1.6.89 and F.No. 342/1/88 dated 12.7.90.

2. Where there exists no evidence with regard to the above named three suppliers having been engaged in the manufacturing activities towards

aluminium ingot and zinc alloy ingots and the same also not been verified by the Deptt. during the course of investigation, as confirmed by the officers during the cross-examination, is still correct to hold that the supplies effected to appellants by these suppliers were from their manufacturing activities.

3. Before denying the MODVAT credit on the invoices issued by the above named suppliers, whether the Deptt. has discharged the burden of establishing with an acceptable legal evidence that such suppliers are the manufacturer of aluminium ingots and zinc alloy ingots and zinc alloy ingots and further the goods supplied to the appellants were infact from such alleged manufacturing activity.

4. Where the Supdt. of Central Excise, Preventive and the enquiry officer of preventive, connected with case have deposed during Cross-examination of having not conducted any enquiries with regard to the production capacity, power/electricity consumed, books of account, verification, number of workers if any employed by such suppliers, should it not be held that there is absolutely no evidence on record which could establish such suppliers to be the manufacturer of the goods supplied to the appellants.

5. To a case where it does not stand established about the goods supplied to be non-duty, should be Hon''ble Tribunal have not extended the benefit of deemed credit and thereby quashing the order of the Commissioner, Delhi for denial of MODVAT credit and for imposition of penalty.

6. Where the invoices supplied by the suppliers have been filed along with regular monthly RT-12 returns and on the basis of which deemed MODVAT credit availed and such returns being assessed by the Range Superintendent under Rule 173-1 should it not have been held that the appellants could not be charged with mis-declaration and suppression and the extended period of five years could not be invoked in the present case.

7. Where the statement of Shri S.S. Aggarwal, partner of the firm confirms that he had no knowledge about the goods being exempted and where the evidence on record also does not suggest any such knowledge on the part of the appellants or Shri S.S. Aggarwal or any other partner and where the monthly RT-12 returns filed or also assessed under Rule 173-1, and where the investigating officer did not verify from Supdt. Range concerned with the assessment of RT-12 returns about his knowledge, should this Hon''ble Tribunal have not followed the ratio of the decision even of the Apex Court passed in the case of Collector of Central Excise v. Vikash Gases Ltd., 1997 (95) E.L.T. 457 (S.C.) and ratio in the case of M/s. Rainbow Industries (P) Ltd. Vs. Collector of Central Excise, Vadodara, wherein it has been held that extended period of five years cannot be invoked where the classification/price list/assessments have been approved/assessed by the Deptt."

3. The Tribunal after hearing the learned counsel for the parties and examining the evidence on record came to the categoric finding that the petitioner company is not entitled to the benefit of deemed credit (Modvat credit) on the inputs

which are clearly recognisable as non-duty paid. The Tribunal further mentioned that no substantial question of law arose in the reference and according to the opinion of the Tribunal, no reference is warranted in the instant case.

3. The petitioner company aggrieved by the said order has approached this Court. It may be pertinent to mention that during the pendency of this petition the petitioner company filed an additional affidavit by which the earlier questions of law have been discarded and only one question of law was formulated. The same reads as under:-

"Whether the extended period of limitation u/s 11A(1) of the Central Excise Act, 1944 can be invoked where the invoices raised by the suppliers, on the basis of which the deemed credit was being availed by the Applicant, were regularly being filed with the monthly RT-12 Returns which were duly assessed by the Range Superintendent under Rule 173-I of the Central Excise Rules, 1944."

4. The basic facts which are necessary to dispose of the Reference are recapitulated as under:-

5. On 4.1.1992 the Central Excise Staff, New Delhi paid a surprise visit to the factory premises of the petitioner company. During the course of scrutiny of records they discovered that the petitioner company is taking benefit of Modvat credit on aluminium alloy and zinc alloy ingots on the basis of invoices. Some of the invoices showed that the suppliers were not traders but manufacturers of the goods supplied by them on which deemed credit was taken.

7. The partner of the petitioner company, S.S. Aggarwal, in his statement dated 4.1.1992 recorded u/s 14 of the Central Excise & Salt Act, 1944 explained the procedure and also stated that M/s Simplex Traders, 11-A, G.T.K. Road and M/s Bharat Alloys and Castings, Gali No. 9, Samaypur, Delhi-42 were the manufacturers of aluminium alloy/zinc alloys purchased by them.

8. The Collector, Central Excise, in his order mentioned that the inputs purchased by the party from M/s Bharat Alloys & Castings, Metal Cast, Simplex Traders & Baldev Metals (P) Ltd., were clearly recognisable as non-duty paid and exempt from duty in as much as that M/s Bharat Alloys & Castings, M/s Simplex Traders, M/s Metal Cast were neither licensee under Central Excise as they have been availing exemption under Notification No. 188/88-CE dt. 13.5.1988 for manufacturing aluminium alloy/ingots/zinc alloys ingots nor any duty was paid by them and further the goods purchased from M/s Baldev Metal were also non-duty paid and clearly recognisable as much, because they have been receiving exemption certificate with each challan and it was for the party to ensure that the inputs on which they were availing deemed Modvat were not recognisable as non-duty paid. It is clearly written on the invoices of M/s Bharat Alloys and Castings, Metal Cast and M/s Simplex Traders that they are manufacturer of the goods. Obviously the party was required to obtain gate pass when the goods are purchased from a factory and non-receipt/procurement of the gate pass shows that the goods were non-duty paid and the deemed Modvat was not admissible.

Similarly, the case of supplies by M/s Baldev Metals, the goods were clearly recognisable as non-duty paid.

9. The learned Collector, Central Excise, mentioned that it appeared that the petitioner company has availed inadmissible deemed Modvat credit during the period 6.5.1989 to 30.9.1991 and for the period 30.10.1991 to 24.1.1992. Learned Collector further mentioned in his order that to avail the Modvat credit the input had to be duty paid. It is further mentioned that the Modvat credit was admissible only in respect of duty paid aluminum/zinc alloys ingots and not on ingots which have enjoyed the exemption. It is also mentioned in the order that there was no doubt that deemed Modvat credit was permitted to be availed on the specified goods but it could be availed only if the goods are clearly recognisable as duty paid. When both the type of inputs that is duty paid and non-duty paid were available, to avail of the Modvat credit the party was required to procure only duty paid inputs. In the order it is also mentioned that the petitioner company purchased the inputs from there manufacturers mentioned above from the market on which no duty was paid and hence deemed Modvat credit was not admissible to them. It is also mentioned that the petitioner company suppressed the material facts from the department by misleading it as much as the declaration filed under Rule 57(G) is with intent to avail Modvat on duty paid goods which was, Therefore, acknowledged but in fact they purchased exempted aluminium alloys/zinc alloys ingots and willfully availed inadmissible Modvat credit thereon. So under Ruled 57(I) of the Rules read with Section 11A of the Act, extended period of 5 years was liable to be invoked for recovery of inadmissible Modvat credit availed by the party.

10. The relevant portion of Section 11A of the Central Excise & Salt Act, 1944 reads as under:-

"Section 11A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded.

(1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, a Central Excise Officer may, within one year from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;

PROVIDED that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any willful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made there under with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect;

PROVIDED FURTHER where the amount of duty which has not been levied or paid or has been short-levied or short-paid or erroneously refunded is one crore of rupees or less a notice under this sub-section shall be served by the Commissioner of Central Excise or with his prior approval by any officer subordinate to him;

PROVIDED ALSO that where the amount of duty has not been levied or paid or has been short-levied or short-paid or erroneously refunded is more than one crore rupees, no notice under this sub-section shall be served without the prior approval of the Chief Commissioner of Central Excise;"

11. The petitioner company incorporated in the petition that the Tribunal has erred in not referring the questions of law which arose in the reference.

12. It is also incorporated in the petition that before denying Modvat credit on invoices issued by the above mentioned suppliers whether the department has discharged the burden of establishing with an acceptable legal evidence that such suppliers are the manufacturer of aluminium and zinc alloy ingots and further the goods supplied to the petitioner company were in fact from such alleged manufacturing activity. It is also incorporated in the petition that the petitioner company has been regularly filing RT-12 Returns on the basis of which deemed Modvat credit was availed and such returns being assessed by the Range Superintendent under Rule 173-1. So the petitioner company cannot be charged with misdeclaration and suppression and the extended period of five years could not be invoked in the present case.

13. We have heard learned counsel for the parties at length. The petitioner company availed of Modvat credit on the goods supplied belonging to the category of exempted goods, or in other words, where no duty was paid. Obviously, the petitioner company could not avail the Modvat credit on such goods. No fault can be found in the respondents'' invoking Section 11A of the Act in the facts and circumstances of this case because the petitioner company suppressed the material facts from the department by misleading it inasmuch as the declaration filed under Rule 57-g is with an intent to avail Modvat credit on goods on which no duty was paid.

14. The petitioner company was not entitled to the benefit of Modvat credit which it has availed. In our considered opinion, no interference is called for. The reference is accordingly disposed of.