

(2013) 03 AHC CK 0217

In the Allahabad High Court

Case No : Central Excise Appeals No's. 815 to 817 of 2012

Bajaj Hindustan Ltd.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 08-03-2013

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 11AC, 35B, 35C(2), 35G

Citation : (2013) 4 ADJ 448 : (2013) 295 ELT 20 : (2013) 19 GSTR 373

Hon'ble Judges : Sunil Ambwani, J; Bharat Bhushan, J

Bench : Division Bench

Advocate : S.K. Bagaria assisted by Sanjay Kumar Singh and Ashish Mishra, for the Appellant; R.C. Shukla, for the Respondent

Final Decision : Dismissed

Judgement

1. We have heard Shri S. K. Bagaria assisted by Shri Sanjay Kumar Singh and Shri Ashish Mishra for the appellants. Shri R. C. Shukla, standing counsel, Union of India appears for the respondents. These three appeals u/s 35G of the Central Excise Act, 1944 arise out of the orders dated June 6, 2012 2013 (195) ECR 411 and September 26, 2012 passed by Customs, Excise and Service Tax Appellate Tribunal (CESTAT), New Delhi rejecting Central Excise Appeal No. 3141/2006-EX(DB) and Application No. E/ROM/2981/2012-EX(DB) (giving rise to Central Excise Appeal No. 815 of 2012) ; Central Excise Appeal No. 3111/2006-EX(DB) and Application No. E/ROM/2980/2012-EX(DB) (giving rise to Central Excise Appeal No. 816 of 2012) and Central Excise Appeal No. 3046/2006-EX(DB) and Application No. E/ROM/2979/2012-EX(DB) (giving rise to Central Excise Appeal No. 817 of 2012) filed against the order dated May 19, 2006 passed by the Commissioner of Central Excise, Meerut I, Uttar Pradesh disallowing the Cenvat credit.

2. In Central Excise Appeal No. 815 of 2012 the Commissioner by the impugned order confirmed the Cenvat credit demand of Rs. 1,65,69,326. In Central Excise Appeal No. 816 of 2012 he had confirmed Cenvat credit demand of Rs.

1,90,52,382 and in Central Excise Appeal No. 817 of 2012 the Cenvat credit demand of Rs. 2,02,96,271 was confirmed against the appellants along with interest imposing penalty of equal amount. The Cenvat credit had been taken by the three units of the appellant during the period from January, 2005 to June, 2005 in respect of M. S. angles, channels, plates, sections, beams, flats, etc., claimed to have been used for fabrication of plant and machinery, for manufacture of sugar.

3. Brief facts, giving rise to these three appeals, are that M/s. Bajaj Hindustan Ltd.--the appellant is engaged in the manufacture of V. P. sugar and molasses falling under Chapter 17 of the First Schedule to the Central Excise Tariff Act, 1985. The company has set up a unit in Village Bhaisana, District Muzaffarnagar for manufacture of cane sugar, with installed cane crushing capacity of 7000 tonnes ; a unit in village Thanabhawan, District Muzaffarnagar with installed cane crushing capacity of 7000 tonnes crushing per day and a third unit in village Bilai, District Bijnor with installed cane crushing capacity of 7000 tonnes crushing per day. All the three units started manufacturing from October, 2005.

4. The units submitted their formal start up intimation to all the Government Departments, and to the Range Superintendent Central excise before starting the commercial production. They intended to avail of Cenvat credit on inputs and capital goods received during the period/process of setting up of their new manufacturing factory and obtained Central excise registration from the office of Assistant Commissioner, Division Muzaffarnagar in the month of August, 2004 for Bhaisana and Thanabhawan units in District Muzaffarnagar and for Bilai unit in District Bijnor. The appellants vide intimation letters dated April 6, 2005 informed the Range Superintendent with the list of statutory and internal records maintained by them as per rule 22(2) of the Central Excise Rules, 2002.

5. The Superintendent, on scrutinizing of ER-1 returns, found that the appellant availed of Cenvat credit on angles, channels, sections, plates as inputs. They were required by the Superintendent, Range Shamli and Bijnor by his letters dated July 22, 2005, July 11, 2005 and June 16, 2005 respectively to explain use of these items as inputs in the plant.

6. The appellants confirmed that these items were being used by them in the manufacture of capital goods and in view of Explanation 2 to rule 2(k), the steel items are inputs as the same were used in the manufacture of capital goods, which were further used in the appellant's factory for manufacturing sugar. The appellants also confirmed that they were maintaining proper records, showing receipts and consumption of each input.

7. The appellant received show-cause notices dated February 7, 2006 and March 30, 2006 (for the period from January, 2005 to March, 2005 and April, 2005 to December, 2005) from the Commissioner, Central Excise, Meerut-I in respect of Bhaisana unit in District Muzaffarnagar. It also received a show-cause notice dated March 3, 2006 (for the period from February, 2005 to December, 2005)

from the Commissioner, Central Excise, Meerut-I in respect of Thanebhawan unit of District Muzaffarnagar. For the Bilai unit of District Bijnor a show-cause notice was issued on February 7, 2006 for the period from January, 2005 to June, 2005.

8. The appellants contested the show-cause notices in all the three units on common grounds, alleging that these notices have been framed without verification of any records and physical verification of machinery and structures fabricated by the appellants in connection with the setting up of the new manufacturing units. The break-up of the entire Cenvat credit according to use of steel items in various sections of the plant is alleged to have been given along with the replies. The appellants submitted that they had not taken Cenvat credit on various steel items, which were earmarked from the very beginning for use in the civil/foundation purposes. The appellants did not take Cenvat credit on the base plates used between the mill equipment and foundations for the bolting of various machinery with base plates. Wherever the steel items were used for raising civil foundation/structure of for non-capital goods items such as staircases, purlins, partitions, buildings and roofing, etc., the appellants have not taken Cenvat credit.

9. By a common order dated May 19, 2006 the Commissioner, Central Excise, Meerut-I adjudicated the matter in respect of all the three units and disallowed the entire Cenvat credit of Rs. 2,02,96,271 availed of by the appellants on inputs and cable goods for Bhaisana unit ; Rs. 1,90,52,382 for Thanebhawan unit in District Muzaffarnagar, and Rs. 1,65,69,326 for Bilai unit in District Bijnor under rule 14 of the Cenvat Credit Rules, 2005 read with section 11A of the Central Excise Act, 1944. He also ordered charging of interest under rule 14 of the Cenvat Credit Rules, 2004 read with section 11AB of the Central Excise Act, 1944 at the appropriate rate in respect of all the three units and also imposed penalty of the amount equal to demand in respect of all the three units under rule 15 of the Cenvat Credit Rules, 2004 read with section 11AC of the Central Excise Act, 1944.

10. Aggrieved the appellants preferred appeals u/s 35B of the Central Excise Act, 1944 in the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), New Delhi. All the three appeals were dismissed by the common order dated June 6, 2012 2013 (195) ECR 411 confirming the findings of the Commissioner, Central Excise, Meerut I dated May 19, 2006. The CESTAT dismissed all the appeals on the ground that no evidence was produced by the appellant with respect to the usage of the items for the manufacture of the capital goods.

11. The appellants filed applications u/s 35C(2) of the Central Excise Act, 1944 in the CESTAT for rectification of mistakes. The applications were dismissed on September 26, 2012, giving rise to these three appeals u/s 35G of the Central Excise Act, 1944 in this court.

12. Shri S. K. Bagaria, appearing in all the three appeals for the appellants submits that it is not disputed that the items in manufacturing of capital goods

were received and used in the factory. There is no allegation of these items not being received in the factory or for any diversion of these items out of the factory. It is also not denied that the new factory has been established and has commenced production. The inputs were used in the manufacture of capital goods. The requisition-issue slip from the departments to the stores gives full details of inputs and the connected capital goods manufactured. They also give the details of the concerned department/section in the plants. The entries of dispatch from store for particular goods is also pasted in the stores ledger. The detailed documents were submitted, giving section-wise end use details giving the name and description of all capital goods. The section/department, in which these goods were installed, is also mentioned in these details. The credit amount is also mentioned and a separate note is filed on each capital good manufactured. The documents also disclosed the nature of contract work, and the name of capital goods. The Commissioner or the Tribunal has not disputed the correctness of these documents.

13. Shri Bagaria submits that the findings of the Commissioner and CESTAT, that the names, description, quantities and usage are not mentioned, are perverse and contrary to the records. It is one thing to say that out of the claims made by the appellants, some items did not answer the definition of capital goods ; it is a completely different thing to disallow the whole of the credit as if no capital goods were manufactured at all and as if the factory itself was not established. The Commissioner and the CESTAT did not even apply their minds to the documents on record. There are no findings with reference to these documents. The entire credit has been disallowed arbitrarily and illegally.

14. Shri S. K. Bagaria submits that the Tribunal had granted interim orders staying orders of the Commissioner in all the matters with the findings that the use of items in the manufacture/fabrication in the capital goods was not disputed by the Revenue. The capital goods manufactured out of items in question were further used in the manufacture of excisable goods. A very strong case was found by the CESTAT at the admission stage in favour of appellants and pre-deposit of whole of the demand and penalty was waived of for hearing of the appeal. There was no change in the factual position thereafter.

15. It is submitted that the capital goods manufactured in the factory and used within the factory in manufacture of excisable goods were fully exempt from Central excise duty under Notification No. 67/1995-CE. No other formality was required, nor there is any provision requiring any further records. This notification was not considered by the authorities and the CESTAT and since in the show-cause notices, no other violation was alleged, the appellants did not get any opportunity to make submissions on the notification.

16. It is submitted that the Commissioner has relied upon section 6 of the Central Excise Act, 1944 ; rules 9, 10, 11, and 12 of the Central Excise Rules, 2002 and rule 9 of the Cenvat Credit Rules, 2004. These provisions have to be read, with the fact situation in that the capital goods in question were fully

exempt from Central excise duty under Notification No. 67/1995-CE. The Commissioner exceeded in exercise of his jurisdiction in relying upon these provisions for the first time in his order. He has relied on the opinion expressed by the Supreme Court in Commissioner of Central Excise, Nagpur Vs. Ballarpur Industries Ltd., and in Commissioner of Central Excise, Chandigarh Vs. Shital International, ; [2011] 1 SCC 109 and submits that where a plea has not been raised in the show-cause notice, the Revenue cannot be permitted to build up a new case against the assessee nor is allowed to take a contradictory stand in relation to the same assessee. A new plea in such a case cannot be entertained.

17. It is submitted that the Tribunal admitted that there are no columns in ER-1 nor there are any instructions or circular for maintaining any other documents and thus, the credit could not be denied.

18. So far as imposition of penalty is concerned, Shri S. K. Bagaria submits that in a case like this there is no scope for levying any penalty u/s 11AC read with rule 15 of the Central Excise Rules. None of the ingredients of section 11AC, namely, fraud, collusion, any wilful misstatement, suppression of fact, or contravention of the Act or Rules with intention to evade the tax has been made out. The entire show-cause notice is on the basis of appellants own ER-1. He has relied upon Commnr. of Central Excise, Chandigarh Vs. Pepsi Foods Ltd., in support of his submission.

19. It is submitted that there was no suppression at all made by the appellants to impose any penalty. The Tribunal had itself consistently allowed Cenvat credit on inputs in similar cases.

20. Shri S. K. Bagaria submits that all the items in question were clearly covered by the definition of capital goods in rule 2(a)(A)(iii) of the Cenvat Credit Rules, 2004. These are all components, spares and accessories of capital goods. There was no necessity or requirement of these being covered by any heading or sub-heading. This position is clear from the rule itself and has been clarified by the Central Board of Excise and Customs in Circular No. 276/110/96-TRU, dated December 2, 1996. The goods in question were bagasse elevator roller chain/cane carrier, steam boiling sheet, delta therm, channel, thread locker, aluminum sheets/coils, rubber sheet, nichel screen, etc., as per the show-cause notices themselves. There was never any dispute about the nature and description of these goods. The only ground taken in the show-cause notices was that these items are not covered by the definition of capital goods. The allegation is ex facie contrary to the definition itself.

21. Shri R. C. Shukla, appearing for the Department, has defended the orders passed by the Commissioner, Central Excise, Meerut-I and the CESTAT. He submits that in their ER-1 returns the appellant did not declare the use of these items in the manufacture of capital goods. They could not satisfy the Commissioner, Meerut-I and the CESTAT nor could explain from the chart as to whether these items were actually used in the manufacture of capital goods. A

specific finding has been recorded by the Tribunal, that on being asked the learned counsel appearing for the appellants as to what is boiler staging, he could not give any explanation. He submits that during adjudication proceedings the appellants placed on record only invoices and a chart vaguely indicating how the items in question were utilised without giving specific details as to how much quantity of structural steel items was used in the manufacture of which machinery or its part, component or accessories. The onus of proof was on the appellants. The appellants had purchased the items and had utilised them. It was within their exclusive knowledge as to how and in what manner these items were put to use. In the adjudication proceedings the appellants, despite the fact that they were given opportunity, did not lead evidence to indicate as to which items of structural steel plates, and what quantities were used for fabrication of machinery. The Commissioner had no option but to disallow the Cenvat credit.

22. Shri R. C. Shukla submits that even if the items, which had been the subject matter of appeals, were used at the time of commissioning of new plant for production of final product, the appellant was required to prove that all the items regarding each Cenvat credit has been used in the processes of commissioning of manufacturing unit. These items were not covered by the definition of capital goods for being eligible for Cenvat credit. The appellant was required to establish that the items were actually used for manufacturing of capital goods.

23. We have considered the submissions and do not find any error of facts or of law, nor do we find that any substantial question of law arises from the order of the CESTAT to interfere in these appeals, raising common facts and grounds.

24. Explanation 2 to rule 2(k) of the Cenvat Credit Rules, 2004 provides: Input include goods used in the manufacture of capital goods which are further used in the factory of the manufactures but shall not include cement, angles, channels, centrally twisted deform or thermo mechanically treated bars, and other items used for construction of factory shed, building or laying of foundation or making of structures for support of capital goods." In view of this Explanation, if the inputs have gone into the manufacture of capital goods, then only they are eligible for Cenvat credit. Such capital goods must be put to actual manufacture of final product. The Cenvat Credit Rules in order to avail of Cenvat credit, require the assessee to establish that the items in question were actually put to use for manufacture, or in relation to manufacture of final product, or the capital goods for which the assessee seeks to avail of Cenvat credit. The CESTAT did not find any error in the order of the Commissioner, Meerut I in denying the Cenvat credit as the appellant had failed to prove that the items, on which the Cenvat credit was claimed, were actually used for fabrication of capital goods used for the manufacture of final product. In the order dated September 26, 2012 rejecting the application u/s 35C(2) of the Act the CESTAT has given reasons as to why it had affirmed the order of the Commissioner, Meerut I. The CESTAT observed that there is no dispute about the facts, that in fabrication of capital goods, the Cenvat credit was taken for M. S. angles, channels, plates, etc. The

appellant, however, neither specifically intimated the Department at any point of time nor the details of these items of capital goods fabricated was declared in ER-1, returns filed by the appellant. The drawings and designs of the capital goods claimed to have been fabricated along with the plant of the material used were not produced before the adjudicating authority on the basis of which it could be ascertained as to how much quantity of structural steel material was used for various items of capital goods claimed to have been fabricated. The store ledgers and the store issue slips did not establish the use of structural steel items issued.

25. The CESTAT further found that the appellant had neither intimated the Department regarding the use of structural steel material for fabrication of various items of capital goods, nor the details of the capital goods fabricated could be found in the ER-1 return. The Jurisdictional Central Excise Officers did not have opportunity to verify these claims.

26. In *Saraswati Sugar Mills Vs. Commissioner of Central Excise, Delhi-III*, ; AIR 2011 SC 3286 the Supreme Court, in a case of manufacture of sugar and molasses availing of Modvat credit facility on excise duty paid for capital goods used in factory, held that for determination as to whether a particular article is a component part of another article, the correct test is to look both at article which is said to be the component part and the completed article and come to a conclusion whether first article is a component part of whole or not. The iron and steel structures were not found to go into the composition of vacuum pans, crystallizers, etc. It was held that such items used for raising structure to support various machines, parts of machinery of plant, would be covered by Explanation to rule 57Q as capital good, was partly allowed, disagreeing with the reasoning given by the Tribunal, Shri S. K. Bagaria has tried to distinguish the judgment on the ground that it relates to the old position under the unamended Act. He submits that by Notification No. 23/2004-CE (N.T.), dated September 10, 2004 in exercise of the powers u/s 37 of the Central Excise Act, 1944 and section 94 of the Finance Act, 1994, the Cenvat Credit Rules, 2004 were notified and which would be applicable to the present case. In these Rules the definition of capital goods under rule 2(a) would include under (A), the following goods, namely . . . (iii) components, spares and accessories of the goods specified at (i) and (ii), and which would include in (i) all goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90, Heading 68.02 and sub-heading 6801.10 of the First Schedule to the Excise Tariff Act and (ii) pollution control equipment. It is submitted that the Cenvat credit is applicable for a manufacturer under rule 3(1) or purchaser of final product or a provider of taxable service to take credit of excise duty or the duties specified in rule 3(1)(i) to (xi) paid on any inputs or capital goods received in the factory for manufacture of final product or premises of the provider, to output service on or after September 10, 2004. The definition of the word "input" in rule 2(k) is to be understood with Explanations 1 and 2. Explanation 2 provides that input includes goods used in the manufacture of capital goods which are further used in the factory of the manufacturer.

27. There is no dispute that the Cenvat Credit Rules, 2004 have undergone change to the effect, as provided in Explanation 2 to rule 2(k) to include in the definition of input to include goods used in the manufacture of capital goods. We are, however, not concerned here with the legal position as to whether goods used by the appellant will be treated as input in the manufacture of capital goods, which are further used in the factory for manufacture. The CESTAT has confirmed the findings of fact recorded by the Commissioner that the appellant could not satisfy the Commissioner, Meerut I as the adjudicating authority, in pursuance to the reply given and the material produced to the show-cause notice, as to whether the goods on which Cenvat credit was taken, were actually used in the manufacture of capital goods.

28. The conditions of availing of Cenvat credit include the maintenance of documents and accounts under rule 9 of the Cenvat Credit Rules, 2004 and which include under sub-rule (a)(i) an invoice issued by a manufacturer for clearance of--(I) inputs or capital goods from his factory or depot or from the premises of the consignment agent of the said manufacturer or from any other premises from where the goods are sold by or on behalf of the said manufacturer ; (II) inputs or capital goods as such. In the present case the appellants could not satisfy by producing relevant evidence that the inputs on which Cenvat credit was taken was actually used for manufacture of capital goods, as no good or sufficient material was made available to satisfy the adjudicating authority.

29. In the facts and circumstances, we find that the questions raised in these appeals are questions of fact, and thus no substantial questions of law arise for consideration by us in these appeals.

30. So far as the imposition of penalty is concerned, we do not find any error in the findings that the penalty is attracted in this case as the appellants had taken Cenvat credit without satisfying the conditions set out and in violation of the Cenvat Credit Rules. Further on the issue, as to whether section 11AC of the Central Excise Act, 1944 gives for any discretion on imposition, and on the determination of quantum of penalty, we find that the question has been considered by a co-ordinate Bench of this court in Commissioner of Customs and Central Excise Vs. M/s. Majestic Auto Ltd., , Central Excise Appeal No. 142 of 2004 decided on July 6, 2012. This court, considering the judgments in Union of India (UOI) and Others Vs. Dharamendra Textile Processors and Others, ; Dilip N. Shroff Karta of N.D. Shroff Vs. Joint Commissioner of Income Tax, Special Range Mumbai and Another, , and Union of India (UOI) Vs. Rajasthan Spinning and Weaving Mills, , held as follows (page 75 of 18 GSTR):

From the proposition as laid down in above cases, the ratio deducible is that the quantum of the penalty equal to the duty determined as contemplated by section 11AC is mandatory and there is no discretion in the adjudicating authority or the Tribunal to impose different amount of penalty. In a case where penalty is leviable u/s 11AC on fulfilment of the conditions as enumerated in section 11AC,

the penalty equal to the amount of duty determined is mandatory and there is no discretion in the Tribunal to reduce the said penalty. However, as laid down by the apex court in Union of India (UOI) Vs. Rajasthan Spinning and Weaving Mills, , the penalty u/s 11AC can be imposed only when the conditions mentioned in section 11AC exist. The authorities have no discretion in fixing the quantum of penalty and penalty equal to the duty must be imposed once section 11AC is made applicable.

In view of the foregoing discussions, the question of law is answered in favour of the Revenue in following manner:

The Appellate Tribunal had no discretion to reduce the amount of penalty as specified u/s 11AC.

The appeal is allowed. Parties shall bear their own cost.

31. We are in respectful agreement with the reasons given in Commissioner of Customs and Central Excise Vs. M/s. Majestic Auto Ltd., and do not find any error of law in the impugned orders imposing penalty. For the aforesaid reasons all the three appeals are dismissed in limine.