

(2009) 03 UK CK 0005
In the Uttarakhand High Court

Bharat Heavy Electricals Ltd.

APPELLANT

Vs

Commissioner Central Excise

RESPONDENT

Date of Decision : 18-03-2009

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35H, 37

Citation : (2009) 165 ECR 1 : (2009) 241 ELT 33

Hon'ble Judges : Prafulla C. Pant, J;B.S. Verma, J

Bench : Division Bench

Judgement

Prafulla C. Pant, J.—An application was moved u/s 35H of Central Excise Act, 1944, by the assessee for making reference on questions arising out of the impugned order dated 21.03.2003, passed by Custom, Excise and Service Tax Appellate Tribunal (herein after referred as CESTAT), New Delhi, in appeal No. EA/2911-12/02-C of 2002, on which under directions of this Court, reference was made by said Tribunal on following questions:

1. Whether the matter (BHEL's Appeal against CCE/Meerut's O-1-O No. 36-37/Commr/2002 dated 30.09.2002) heard and decided by the CESTAT on 21/03/2003 was continuation of the same proceedings as initiated vide Superintendent Central Excise's Show Cause Notices dated 26/06/1996 and 27/08/1996?
2. Whether the question of law about the legal competence of Superintendent Central Excise to issue Show Cause Notice (herein after referred as SCN) for disallowance of Modvat Credit and consequently of the jurisdiction of Adjudicating Authority over the matter (which depended on legality & validity of SCN) was legally permissible to be raised in the hearing dated 21/03/2003 of the Appeals before CESTAT?
- 3(a) Whether the directions by the CESTAT vide its order No. A/922/2000-NB dated 19/10/2000, to Commissioner C. Excise Meerut to decide the admissibility of and to re-quantify the credit allegedly availed beyond the period of six months

from the date of duty paying documents of inputs in terms of its ruling in 2000 (93) ECR 239 excluded the application of the Hon"ble Supreme Courts ruling in Eicher Motors Limited and Another Vs. Union of India and Others Etc., ?

i.e. Whether right to credit under Modvat Scheme, as it stood on 29/06/1995 "accrued to assessee on the date when they paid tax on raw materials and inputs" (as held by Supreme Court in Eicher Motors case) and whether the act of making entry of receipt of such inputs in part-I of the single comprehensive RG-23A Account evidenced crystallization of the right to Modvat in favour of the assessee thus amounting to taking of the credit?

3(b). Whether S-131 of Finance Act, 1999 inserting Clause (XXVII) in S-37 of Central Excise Act, 1944, goes to the extent of neutralizing 3 Supreme Court's ruling about the date of accrual of right to Modvat Credit to the assessee and its crystallization in his favour and whether observation to this effect by Tribunal in Kusum Ingot's case were correct?

2. Heard learned Counsel for the parties.

3. Brief facts of the case:

Brief facts of the case are that M/s Bharat Heavy Electrical Ltd. (hereinafter referred to as BHEL) are engaged in the manufacture of Thermal & Hydro Turbines, Generators, Condensers, Heat Exchanger, and Electric Motors. BHEL filed a declaration to avail the credit in respect of the duty paid on inputs under Rule 57 A of Central Excise Rules for the period December 1995 to March 1996 and started working under the Modvat Scheme. Two show cause notices dated 26.06.1996 and 27.08.1996 were issued by the Superintendent of Central Excise, Haridwar, to disallow the credit on the following grounds:

(i) credit taken beyond the permissible period of six months from the date of duty paying document

(ii) credit taken on the lubricating oil being not admissible,

(iii) credit taken on certain inputs without filing prior input/declaration of 57 G of Central Excise Rules not admissible.

The matter was adjudicated by Commissioner of Central Excise, Meerut vide order-in-original dated 23.12.96/26.12.96, whereby part of the demand was dropped and remaining demand was confirmed by denying credit and also the penalties were imposed. M/s BHEL filed appeal before CESTAT and the said Tribunal vide final order No. A/922-923/2000-NB dated 19.10.2000 set aside the adjudication order and matter was remanded to the Adjudicating Authority to requantify the duty and penalty in the light of the finding of the Tribunal. The Tribunal while remanding the matter to the Adjudicating Authority decided two issues regarding the benefit of credit in respect of lubricating oil and regarding filing the declaration of inputs and outputs under Rule 57 G in the Assessee's favour and the issue regarding admissibility of Cenvat credit beyond the

permissible period of six months from the date of duty paying documents against them. In the remanded proceedings, the Adjudicating Authority vide order dated 30.09.2002 besides disallowing credit amounting to Rs. 6,01,928/- on documents over six months old, also disallowed Cenvat credit amounting to Rs. 1,98,626/- on Sulphuric Acid Gas analyzer and Transmitter and Cenvat Credit amounting to Rs. 1,26,862/- on the Appellant under Rule 173 A (1) (bb) of the Central Excise Rules, 1944. The Assessee again filed appeal before the Tribunal and the Tribunal vide impugned order No. A/167-168/03-NB-C dated 21.03.2003 set aside the order passed by Adjudicating Authority on the ground that the order was beyond the scope of remand order and matter was again remanded to the Adjudicating Authority for requantification of amount of credit to be disallowed.

4. Discussions and decision on the questions referred:

Shri Z.U. Alvi, learned Counsel for the assessee drew attention of this Court to circular letter No. F 267/104/87-CX .8, dated 15.12.1987, and argued that the Central Board of Excise and Customs, New Delhi, has expressly made clear that the show cause notices are required to be issued for disallowing Modvat credit by Assistant Collectors (now Assistant Commissioners). In this connection, our attention is also drawn to another circular letter issued by the Board, numbering 66/88, dated 20.12.1988, which provides that in the matters of wrong availment of Modvat Credit, respective adjudicating Officer would issue and decide the show cause notice. Further reliance is placed to third circular letter No. 3/92-CX 6, dated 14.05.1992, which classifies powers of the adjudicating officers from the ranks of Assistant Collector to Collector (now Assistant Commissioner to Commissioner). On its basis, it is argued that the show cause notice issued by Superintending Central Excise, cannot be said to be valid as he was not the proper officer to issue the same. It is also pointed out on behalf of the assessee that in Commissioner of Central Excise, Bolpur Vs. Ratan Melting and Wire Industries, , Kalyani Packaging Industry Vs. Union of India (UOI), and Collector of Central Excise, Vadodara v. Dhiren Chemical Industries 2001 (12) LCX 0010, the Apex Court has made it abundantly clear that the circular letters are binding on the officers of the department. We have considered the submissions of learned Counsel for the assessee. We do agree that in view of the observations made in aforementioned cases it is settled proposition of law that the circular letters issued by the Board of Central Excise, are binding on the officers of Central Excise Department, to the extent they are not declared ultra vires. We also agree that only proper officer or the officer authorised by the Government of India has power to issue show cause notice and adjudicate the matter. But the perusal of the relevant circular letters read with the Rule 57-I shows that the Superintending Central Excise was not barred from issuing show cause notice in the present case of recovery of Modvat Credit wrongly availed by the assessee. Circular letter No. F 267/104/87-CX .8, dated 15.12.1987, is silent as to who can issue the show cause notice, it simply says that competent officer to decide the matter on the show cause notice issued for disallowing Modvat credit is Assistant

Collector. Of course, the circular letter No. 66/88 dated 20.12.1988 provides that in cases of wrong availment of Modvat Credit (except the cases of suppression of facts, wilful misstatements, collusion etc), respective adjudicating officers should issue and decide the show cause notice. As far as circular letter No. 3/92-CX 6, dated 14.05.1992 is concerned, it is also silent as to who can issue notice. The relevant rule applicable to the case is Sub-rule (1) of Rule 57-I of Central Excise Rules, 1944, which reads as under:

Rule 57-I. Recovery of credit wrongly availed of or utilised in an irregular manner- (1) (i) Where credit of duty paid on inputs has been taken on account of an error, omission or mis-construction, on the part of an officer or manufacturer, or an assessee, the proper officer may, within six months from the date of filing the return required to be submitted in terms of Sub-rule (4) of Rule 57G, and where no such return as aforesaid is filed, within six months from the last date on which such return is to be filed under the said rules, serve notice on the manufacturer or the assessee who has taken such credit requiring him to show cause why he should not be disallowed to such credit and where the credit has already been utilised, why the amount equivalent to such credit should not be recovered from him:

Provided that where such credit has been taken by reason of fraud, wilful mis-statement, collusion or suppression of facts, or contravention of any of the provisions of the Act or the rules made thereunder with intent to evade payment of duty, the provisions of this sub-rule shall have effect as if for the words "six months", the words "five years" were substituted.

(ii) The proper officer, after considering the representation, if any, made by the manufacturer or the assessee on whom notice is served under Clause (i), shall determine the amount of such credit to be disallowed (not being in excess of the amount specified in the show cause notice) and thereupon such manufacturer or assessee shall pay the amount equivalent to the credit disallowed, if the credit has been utilised, or shall not utilise the credit thus disallowed.

Explanation-Where the service of the notice is stayed by an order of the Court, the period of such stay shall be excluded from computing the aforesaid period of 6 months or 5 years, as the case may be

The aforesaid rule clearly provides that proper officer can serve the notice on the manufacturer or the assessee for recovery of credit wrongly availed or utilised in an irregular manner. The circular letter dated 15.12.1987, only clarifies as to who can decide the matter on show cause notice and not as to who can issue the show cause notice. Similarly, circular letter dated 14.05.1992, referred above only classifies the adjudicating authorities but does not disclose as to who can issue the show cause notice. The only circular letter dated 20.12.1988, indicates that adjudicating officer, can issue and decide the show cause notice but the subsequent circular letter No. 299/15/97-CX dated 27.02.1997, issued by Central Board of Excise and Customs, New Delhi, supersedes all earlier circular letters

and provides that proper officer refers to the Jurisdictional Central Excise Officer. In para-5.2 of said circular letter dated 27.02.1997, it has been clarified that show cause notices will be issued by Range Superintendents adjudicated by Deputy Commissioner/Additional Commissioner or Commissioners where they are to be adjudicated by the Assistant Commissioners, and such notices would be issued by Assistant Commissioners when they are to be . This para settles the dispute raised by the assessee as to competence of Superintendent Central Excise in the matters to be adjudication by the Assistant Commissioners. Therefore, we do not find any illegality in the show cause notice issued by Superintendent Central Excise, in the present matter. Also, perusal of reply to show cause notice given by the assessee, further shows that the assessee has nowhere objected to the competence of the issuing authority (Superintending Central Excise). Apart from this, since all the objections raised by the assessee are considered by the competent adjudicating authority as such, no prejudice appears to have been caused to the assessee. As such, the questions No. 1 and 2 referred stand answered.

5. Learned Counsel for the assessee drew attention of this Court to the case of Eicher Motors Limited and Another Vs. Union of India and Others Etc., and argued that under the Modvat Scheme, the right to credit become absolute when input is used in the manufacture of the final product. In this connection, it is further contended that once on the inputs, the assessee has already paid the taxes on the goods utilised in manufacture of further products, as inputs then the tax on these goods gets adjusted, which are The case in hand relates subsequent to the amendment made in Section 37. Vide notification No. 28/95-CE(NT) dated 29.06.1995, following proviso was inserted in Rule 57 G (2): finished subsequently. As such, the right accrued to the assessee on the date when they paid the tax on the raw materials or the inputs continues until the facility is available under the Modvat Credit Scheme. However, Eicher Motors Ltd. (Supra) case refers to the period prior to 16.03.1995 i.e. the date when Clause (XXVIII) was inserted in Section 37 of Central Excise Act, 1944. Said Clause (XXVIII) provides that the rules may provide for the lapsing of credit of duty lying unutilised with the manufacturer of specified excisable goods on appointed date and also for not allowing such credit to be utilised for payment of any kind of duty on any excisable goods on and from such date.

Provided further that the manufacture shall not take credit after six months from the date of issue of any of the documents specified in the First proviso to this Sub-Rule.

The object of insertion of above proviso is to provide limitation in taking benefit of the Modvat Credit Scheme and not to misuse or abuse the same. In 2000 (93) ECR 239 , larger bench of CESTAT, Northern Bench, New Delhi, has taken a view that the crucial event determining the admissibility of credit is the receipt of the inputs and not the act of taking credit. Therefore, the amendment made on 29.06.1995, would not be applicable to the credits that had crystallised before

29.06.1995. Relying on said judgment, the question relating to determination of six months period was decided by the CESTAT between the parties to this reference in appeal No. E/514/97-NB and connected matters decided on 19.10.2000 and it was held that the credit would be available not beyond the period of six months from the date of duty paying documents. Said judgment dated 19.10.2000 passed by CESTAT by which the Tribunal remanded the matter to Commissioner only for requantification of duty, was not challenged by the assessee as such, the same attained its finality between the parties. Therefore, it is not open for the assessee to challenge the same now. Accordingly, the rest of the questions No. 3 (a) and 3 (b) referred also stand answered.

6. The reference stands decided.