(2009) 07 BOM CK 0035

In the Bombay High Court

Case No : Writ Petition No. 2647 of 2002

Bhor Industries Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 23-07-2009

Acts Referred:
Central Excise Rules, 1944 — Rule 57, 57I

Citation : (2011) 266 ELT 444

Hon'ble Judges : Ferdino I. Rebello, J;D.G. Karnik, J

Bench : Division Bench

Advocate : V. Shreedharan along with Prakash with Jas Sanghavi instructed by PDS Legal, for the Appellant; R.V. Desai along with Rohit Pardeshi, for the Respondent

Final Decision : Allowed

Judgement

Ferdino I. Rebello, J.—Petitioner is partly aggrieved by the order dated 6-12-2000 [2001 (138) E.L.T. 224 (Tribunal)]. The learned Tribunal accepted the contention of the Petitioners that though the product (input) P.V.C. Film was exempted from payment of duty, if the Petitioner had paid duty they were entitled to take credit for the same.

After having so said, the tribunal proceeded to hold that as coated fabric is classifiable under Heading 59.04 and it cannot be manufactured without first converting the granules into plastic sheet or film which then is to be used in the manufacture of the final product i.e. Coated fabrics and the Petitioners could not have acceded the limits specified in Notification No. 117/86 -C.E. to Rs. 5,50 per sq. mtr. The Petitioners are aggrieved by this latter part of the order.

2. The Petitioners purchased PVC resin falling under the Heading 39.04 in the market and availed of MODVAT credit for the same. From PVC resin the Petitioners manufacture PVC film/sheets falling under the Heading 39.20. The credit of duty paid on PVC resin is utilized for payment of duty on PVC film/sheet.

The PVC film/sheet is cleared by the Petitioners on payment of appropriate duty of excise. The credit of duty paid on PVC film is taken on the credit as utilized for payment of duty on leather cloth. The Petitioners chose to pay duty on PVC film though the same was exempted by Notification No. 217/86-C.E., dated 2-4-2006.

3. A show cause notice was issued to the Petitioners demanding duty for the period from July to December, 1992 on the ground that the Petitioners ought to have availed exemption under Notification No. 217/86-C.E. for PVC film/sheet. Show cause notice demanded the duty paid by the Petitioners for PVC film/sheets and taken as credit and utilized for payment of duty on leather cloth. The show cause notice specifically mentioned as under :

....as to why Central Excise duty of Rs. 1,42,91,086 for period from July, 1992 to December, 92 should not be demanded and recovered from them under Rule 57-I of Central Excise Rules, 1944.

In Annexure A it was further set out as under :

Thus the entire MODVAT credit in respect of duty so paid on P.V.C. sheets/film to be reversed under Rule 57-I of C. Ex. Rules, 1947. Therefore, this show cause Notice is issued.

In Annexure B what is sought to be reversed is the MODVAT credit wrongly on PVC Film/sheets.

4. Respondents filed their reply dated 30-7-1998. It was set out therein that the goods under the Heading No. 569.03 are manufactured by three different processes viz. Coating, impregration and lamination. In coating and impregnation process, rosins are directly used in manufacture of artificial leather cloth. In Lamination process resin is first used in manufacture of PVC film/sheet which is used as input in manufacture of artificial leather cloth. It is not a continuous process.

It was further set out that the resin is an input for PVC sheet/film which is an input for artificial leather cloth. The assessee manufactures PVC sheet/ form for sale and also uses the same for captive consumption for manufacture of artificial leather cloth.

5. The Commissioner of Central excise passed an order holding that the Petitioners had not to pay duty on PVC film and they ought to have availed of the exemption under Notification No. 217/86-C.E. Thus the duty paid on PVC film and utilized for payment of duty on leather cloth was ordered to be recovered by Respondent No. 3.

In an appeal before CEGAT Respondent No. 2 passed an order holding that the Petitioners have option to pay duty on PVC film instead of availing exemption in Notification No. 217/86-C.E. CEGAT further proceeded to hold that restriction contained in third proviso to Para 2 of Notification No. 217/86-C.E.(M.P.) as amended the duty under Rule 57(a) is applicable to the Petitioners case and accordingly directed the Assistant Commissioner now Deputy Commissioner to recover the duty from the Petitioners.

6. At the hearing of this petition, on behalf of the Petitioners their learned counsel submits that the order of CEGAT makes out a new case which is beyond what was demanded in the show cause notice. The show cause notice and the order of the Commissioner proceeded on the basis that as PVC film was exempt from duty by virtue of the notification, merely because the Petitioners had paid duty would not entitle them to take credit of said duty for payment of duty on leather cloth. It is further submitted that the restriction contained in Notification No. 217/86-C.E. is applicable only in respect of the credit taken on activities falling under Heading 39.04 when utilized for payment of duty of goods falling under Heading 59.03. This restriction is not applicable to a case where the duty paid on goods falling under Heading 39.20 is taken and utilized for payment of duty under Heading 59.03. It may be pointed out that that the Petitioners by way of an application for rectification has sought to correct the mistake in direction issued by the CEGAT. However, the same was rejected.

On behalf of the Respondents, the learned counsel submits that the tribunal was right in holding that the Petitioners could not have availed of the credit as taken by them and the tribunal was within its jurisdiction considering show cause notice to have made the order as made. It is further submitted that the tribunal in the interest of justice could have moulded the relief and passed the order as passed.

7. The law on the subject on powers of tribunal to do complete justice and mould the reliefs has been succinctly set out by the Supreme Court in Hindustan Polymers Co. ltd. v. C.C.E. 1999 (106) E.L.T. 12 (S.C.). We may gainfully reproduce para 6:

6. While we appreciate the Tribunal''s desire to do complete justice and mould the relief in that direction, we think that, in the circumstances, the Tribunal should not, in this case, have passed an order which proceeded upon a basis that is altogether different from that of the demand made upon the appellants. That is not "moulding" relief. The demand that was made upon the appellants was under Tariff Item 68 and it proceeded upon the basis that there was a process of manufacture of coloured polystyrene from C uncoloured polystyrene. Having come to a conclusion against the Revenue on these counts, the appropriate order for the Tribunal to have passed was to have set aside the demand and left it open to the Revenue to proceed against the appellants, as permissible under the law. The appellants would then have had the opportunity of meeting the precise case made out by the Revenue.

The law thus and the ratio emerging from the judgment is that it is not open to a tribunal under the guise of moulding relief to pass order in respect of a demand which was never made.

8. In the instant case, we find that the show cause notice was only in respect of

the reversal of MODVAT credit on the ground that the input was exempted and as such could not have been utilized. No show cause notice was issued to the Petitioner on the ground that the Petitioner had wrongly claimed the credit than what the Petitioner was entitled to. The Tribunal further in its order proceeded on the footing that there was only one method of making the coated fabric and that was whereby PVC granules have necessary to be converted into plastic film which then alone can then be used to coat the fabric. This finding is directly contrary to the stand taken by the Petitioners in their reply to the show cause notice where it has been set out that the goods under the heading 59.03 are manufactured by three different processes viz. Coating, impregnation and lamination. The Petitioners used lamination method. In such method resin is first used to manufacture PVC film/sheets which is then used as an input in the manufacture of artificial leather cloth. The assessee in the instant case had claimed credit towards payment of duty on final product PVC sheet/film as an input for manufacture of artificial leather cloth. In the two other methods coating and impregnation resins are directly used in manufacture of artificial leather cloth. The tribunal lost sight of the said fact.

9. In so far as the notification is concerned, it is only applicable in respect of the credit taken on inputs falling under Heading No. 39.04 when utilized for payment of duty on the goods falling under Heading 59.03. This restriction is not applicable in the case where duty paid on the goods falling under Heading 39.20 is taken and utilized for payment of duty on the goods falling under heading 59.03.

10. For the aforesaid reasons, we are clearly of the opinion that the tribunal misdirected itself in travelling beyond the show cause notice. To that extent the direction issued in terms of Para 10 of the order of the tribunal directing Assistant Commissioner to communicate to the appellant duty required to be paid being without jurisdiction is set aside.

11. Rule made absolute accordingly.

12. There shall be no orders as to costs.

