(2015) 10 AHC CK 0116

In the Allahabad High Court

Case No : Central Excise Reference No. 8 of 2001

C.C.E. APPELLANT

Vs

Ester India Ltd. RESPONDENT

Date of Decision : 27-10-2015

Acts Referred:
Customs Tariff Act, 1975 — Section 3, 4

Citation : (2016) 332 ELT 468 : (2016) 36 GSTR 493

Hon'ble Judges : Sudhir Agarwal and Shashi Kant, JJ.

Bench : Division Bench

Advocate : Jitender Kumar, for the Respondent

Judgement

Sudhir Agarwal, J.—Heard learned counsel for parties.

2. This reference has come up pursuant to judgment of Apex Court in Civil Appeal No. 14 of 2001, decided on 3rd January, 2001, whereby following two questions have been referred to the High Court for its opinion.

"(a) Whether HSD can be taken as input as mentioned in section ''AAA'' of Central Excise Rules, 1944 and as defined under Rule 57A of Central Excise Rules, 1944?

(b) Whether the modvat credit can be allowed on the High Speed Diesel Oil falling under Heading No. 27.10 of Central Excise Tariff Act, 1985, which cannot be taken as inputs and which is specifically excluded from the purview of the modvat under Rule 57A of Rules.?"

3. Brief facts, giving rise to aforesaid dispute, are as under :

4. M/s. Ester India Ltd. (hereinafter referred to as ''Assessee'') is engaged in manufacture of Polyester Chips, Polyester Films and Polyester Filaments etc., used High Speed Diesel (hereinafter referred to as ''HSD'') as fuel for generation of electricity and manufacture of aforesaid items. It used to claim MODVAT credit under Rule 57A of Central Excise Rules, 1944 (hereinafter referred to as ''Rules,

1944'').

5. Assistant Commissioner, Central Excise, however took the view that assessee was not justified in claiming MODVAT credit on the use of HSD, since it was not an ''input'' in terms of Rule 57A read with Notification No. 5/94-CE, dated 01.03.1994. Notice was issued to assessee, and thereafter, Assistant Commissioner denied MODVAT credit vide order dated 23rd June, 1997 on the ground that HSD is specifically excluded from Rule 57A, hence cannot be covered by definition of ''input'' under the said Rule.

6. Assessee filed appeal before Commissioner (Appeals), which was dismissed vide order dated 10.02.1998 and view taken by Assistant Commissioner was upheld. Matter was taken in second appeal before Custom, Excise and Gold (Control) Appellate Tribunal, New Delhi (hereinafter referred to as ''Tribunal''), who held vide order dated 05.02.1999, that HSD is used in generating electricity, which in turn is used in running machines for manufacture of various items, in which assessee is engaged and hence in terms of decision of M/s. India Cement v. Commissioner Central Excise Hyderabad [1997 (95) ELT 520], assessee was entitled for MODVAT credit. The Tribunal thus allowed appeal.

7. Revenue made an application for referring the above two questions of law to this Court. The Tribunal took a view that though questions of law have arisen, but there is no reason to make reference to this Court and rejected application vide order dated 04.08.2000. Matter was taken to Apex Court by Revenue in Civil Appeal No. 14 of 2001, which has been allowed vide judgment dated 03.01.2001 and Apex Court has directed Tribunal to refer aforesaid questions to this Court for opinion and that is how the above two questions have come up for opinion of this Court.

8. Learned counsel appearing for Revenue, admitted that for the period of dispute in the present case, Rule 57A, as applicable, was as under:--

"RULE 57A. Applicability.--(1) The provisions of this section shall apply to such finished excisable goods (hereinafter referred to as the "final products"), as the Central Government may, by notification in the Official Gazette, specify in this behalf, for the purpose of allowing credit of any duty of excise or the additional duty under Section 3 of the Customs Tarif Act, 1975 (51 of 1975), as may be specified in the said notification (hereinafter referred to as the "specified duty") paid on the goods used in or in relation to the manufacture of the said final products (hereinafter referred to as the "inputs") and for utilising the credit so allowed towards payment of duty of excise leviable on the final products, whether under the Act or under any other Act, as may be specified in the said notification, subject to the provisions of this section and the conditions and restrictions that may be specified in the notification :

Provided that the Central Government may specify the goods or classes of goods in respect of which the credit of specified duty may be restricted.

[Explanation.--For the purposes of this rule, "inputs" includes -

(a) inputs which are manufactured and used within the factory of production, in or in relation to, the manufacture of final products,

(b) paints and packaging materials,

(c) inputs used as fuel, and

(d) inputs used for generation of electricity, used within the factory of production for manufacture of final products or for any other purpose, but does not include -

(i) machines, machinery, plant, equipment, apparatus, tools or appliances used for producing or processing of any goods or for bringing about any change in any substance in or in relation to the manufacture of the final products;

(ii) packaging materials in respect of which any exemption to the extent of the duty in excise payable on the value of the packaging materials is being availed of for packaging any final products;

(iii) packaging materials or containers, the cost of which is not included in the assessable value of the final products under section 4 of the Act.]"

9. Rule 57A was substituted by notification dated 01.03.1997, but thereunder also we do not find any substantial alteration so as to exclude HSD from being treated as ''input'' and to attract benefit of MODVAT credit.

10. Explanation to Rule 57A (Clause d), clearly takes within its ambit ''inputs'' used for generating electricity which is used within the factory of production for manufacture of final products or for any other product. It is not the case of Revenue that HSD, used in the case in hand by assessee for generating electricity, is not used within the factory of production for manufacture of final products or HSD is not used in generation of such electricity. The exclusion clause, as it stood in explanation does not bring within its ambit HSD used for generation of electricity.

11. Both questions are therefore, answered in favour of Assessee and against Revenue.

12. Reference stands answered accordingly.

