
(2014) 12 SHI CK 0152
In the High Court Of Himachal Pradesh
Case No : CEA No. 3 of 2010

Commissioner, Central Excise

APPELLANT

Vs

Himachal Wireless Ltd.

RESPONDENT

Date of Decision : 31-12-2014

Acts Referred:

Trade Marks Act, 1999 — Section 154, 19, 23(1)

Citation : (2014) 12 SHI CK 0152

Hon'ble Judges : Sanjay Karol, J;Piar Singh Rana, J

Bench : Division Bench

Advocate : Sandeep Sharma, Senior Advocate and Rajiv Jiwan, Advocate for the Appellant; Rahul Mahajan, Advocate for the Respondent

Judgement

Sanjay Karol, J.—Appeal was admitted on the following substantial question of law:

"1. Whether a party is entitled to the benefit of exemption under Notifications Nos. 175/86-C.E. and 1/93-C.E. dated 1.3.1986 and 28.2.1993, respectively, for the clearance of their product(s) manufactured under the brand name of another company not entitled to SSI exemption?"

2. Learned counsel for the parties invite our attention to the judgment dated 09.12.2009 rendered by a Coordinate Bench of this Court in C.E.O. No. 14 of 2008 titled as Commissioner, Central Excise Chandigarh v. M/s. Saboo Alloys Pvt. Limited. It is not disputed at the Bar that substantial question of law framed by the Court in the instant appeal, on identical facts, also stands answered by this Court in the said decision. For sake of profit, we reproduce the operative portion of the judgment:

"The brief facts of the case are that the assessee is engaged in the manure of S.S. Ingots/Flats. The assessee was obtaining cenvat credit on the inputs used in the manufacture of final product. On 11.4.2005 the assessee opted for benefit of the exemption notification No. 50/2003-CE : dated 10.6.2003 and thereafter the

final product was exempt from excise. An amount of Rs. 2,95,892/- which was lying as modvat credit in the accounts of the assessee was reversed. The assessee filed a claim for refund of the amount on the ground that it was not required to reverse the benefit of modvat credit taken by it on the inputs purchased prior to its opting to take benefit of the exemption notification referred to above. The Assessing Officer rejected the contention of the assessee.

The assessee filed an appeal and the same was accepted and it was held that the modvat credit obtained by the assessee was not required to be reversed. Thereafter, the revenue approached the Customs, Excise & Service Tax Appellate Tribunal (CESTAT) which dismissed the appeal in view of the law laid down by a Five Member Bench in CCE, Rajkot v. Ashok Iron & Steel Fabricators reported in 2002 (48) RLT 789.

The main argument of Sh. Sandeep Sharma, learned Assistant Solicitor General of India is that in the case of Ashok Iron & Steel Fabricators, the Tribunal held that there was no rule which permitted the department to seek reversal of the Modvat credit. He relies upon Rule 9(2) of the Cenvat Rules in this behalf.

It is pertinent to mention here that the Apex Court in Collector of Central Excise, Pune Etc. Etc. Vs. Dai Ichi Karkaria Ltd. Etc. Etc., considered a similar question relating to the reversal of Modvat credit under Central Excise Rules, 1944. Rule 57H(5) of the said Rules reads as follows:--

"Where a manufacturer who opts for exemption from the whole of the duty of excise leviable on goods manufactured by him under a notification based on the value or quantity of clearances in a financial year, and who has been availing of the credit of the duty paid on inputs before such option is exercised, he shall be required to pay an amount equivalent to the credit, if any, allowed to him in respect of inputs lying in stock or used in any finished excisable goods lying in stock on the date when such option is exercised and after deducting the said amount from the said amount from the balance, if any, lying in his credit, the balance, if any, still remains shall lapse and shall not be allowed to be utilized for payment of duty on excisable goods, whether cleared for home consumption or for export."

After considering the Rule 57, the Apex Court held as follows:--

"It is clear from these rules, as we read them, that a manufacturer obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable product immediately it makes the requisite declaration and obtains an acknowledgement thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. There is no provision in the rules which provides for a reversal of the credit by the Excise Authorities except where it has been illegally or irregularly taken, in which event it stands cancelled or, if utilized, has to be paid for. We are here really concerned with credit that has been validly taken, and its benefit is available to the manufacturer without any limitation in time or otherwise unless the

manufacturer itself chooses not to use the raw material in its excisable product. The credit is, therefore, indefeasible. It should also be noted that there is no correlation of the raw material and the final product; that is to say, it is not as if credit can be taken only on a final product that is manufactured out of the particular raw material to which the credit is related. The credit may be taken against the excise duty on a final product manufactured on the very day that it becomes available."

Rule 9(2) of the Cenvat Rules reads as follows:--

"A manufacturer who opts for exemption from the whole of the duty of excise leviable on goods manufactured by him under a notification based on the value or quantity of clearances in a financial year, and who has been taking of cenvat credit on inputs before such option is exercised, he shall be required to pay an amount equivalent to the cenvat credit, if any, allowed to him in respect of inputs product is destroyed by fire before stage of its removal from factory premise. In such circumstances, no excise duty becomes payable on end product. Yet Modvat credit availed on inputs used in destroyed goods is not to be recalled. This is also suggestive of the fact the relevant date for considering exemption from duty of the end product in or in relation to which inputs are used is the date of its receipt in factory and condition is its actual use in or in relation to manufacture of end product by the manufacturer. The chargeability to duty or non-chargeability due to exemption or notified nil rate is to be considered at the stage before goods are actually produced, but on receipt of inputs intended to be used in manufacture of such goods. That being so ultimate clearance of goods at nil rate due to contingency existing at the time of removal does not affect the entitlement that legally arises long before that date."

We are in respectful agreement with the judgment of the Kerala and Rajasthan High Courts. Since the language of Rule 9(2) of the Cenvat Rules is identical to that of Rule 57H(5) of the Excise Rules, we feel that the interpretation given by the Apex Court has to apply in the present case also and, therefore, even though the final product may be exempt from payment of excise, the assessee cannot be asked to reverse the Modvat credit already taken by it.

In view of the above discussion, the question is answered in favour of the assessee and against the revenue. The appeal is accordingly dismissed. No order as to costs."

3. Operative portion of the impugned order dated 7.10.2009, reads as under:

"7. The fact that benefit under Notification Nos. 175/86-CE dated 01.05.1986 and 1/93-CE dated 28.02.1993 would be available to the appellants in case the appellants are able to satisfy that the registration under The Trade Marks Act was obtained by 01.03.1992 onwards is not in dispute. Equally the record discloses that the authority below have denied the benefit solely on the ground that the registration under the Act was granted on 15.02.2000 and therefore the benefit thereof cannot be claimed prior to that date.

8. Section 23(1) of The Trade Marks Act, 1999 reads thus:--

"(1) Subject to the provisions of section 19, when an application for registration of a trade mark has been accepted and either-

(a) the application has not been opposed and the time for notice of opposition has expired; or

(b) the application has been opposed and the opposition has been decided in favour of the applicant.

The Registrar shall, unless the Central Government otherwise directs, register the said trade mark and the trade mark when registered shall be registered as of the date of the making of the said application and that date shall, subject to the provisions of section 154, be deemed to be the date of registration".

9. A plain reading of the above provision of law would disclose that once the registration of the trade mark under the said Act is granted, it takes effect from the date of making of the application for the registration. The certificate of registration issued to the appellants clearly discloses that the application was filed on 01.05.1992. In fact, the certificate itself reads that the appellants have been registered under the Act in relation to the trade mark for telephone (basic and cordless) as of the date of 01.05.1992. Obviously, therefore, the authorities below erred in denying the benefit under the said notification w.e.f. 01.05.1992 to the appellants and order in that regard cannot be sustained.

10. For the reasons stated above, the appeal partly succeeds. The appellants are entitled for the benefit under the Notification Nos. 175/86-CE dated 01.03.1986 and 1/93-CE dated 28.02.1993 w.e.f. 01.05.1992 onwards. Appeal accordingly allowed with consequential relief."

4. After taking into account the provisions of the relevant Act and the notification so issued by the Government, the authority below rightly dismissed the appeal filed by the Revenue, holding that the benefit of Notification dated 1.5.1992 was wrongly denied to the Assessee.

With the aforesaid observations, present appeal stands disposed of.