
(2010) 09 GUJ CK 0051
In the Gujarat High Court
Case No : Tax Appeal No. 1736 of 2009

Commissioner of C. Ex. and Customs, vadodara-I	APPELLANT
Vs	
Sterling Gelatin	RESPONDENT

Date of Decision : 09-09-2010

Acts Referred:

Central Excise Rules, 1944 — Rule 25, 57, 57C, 57CC, 57D
Central Excises and Salt Act, 1944 — Section 35G
CENVAT (Credit) Rules, 2002 — Rule 6, 6(2), 6(3)

Citation : (2011) 270 ELT 200

Hon'ble Judges : H.N. Devani, J;Abhilasha Kumari, J

Bench : Division Bench

Advocate : Varun K. Patel, for the Appellant;

Final Decision : Dismissed

Judgement

H.N. Devani, J.—In this appeal u/s 35G of the Central Excise Act, 1944 (the Act), appellant-revenue has challenged order dated 4th February, 2009 [2009 (248) E.L.T. 849 (Tri. - Ahmd.)] made by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Ahmedabad by proposing the following questions :-

(1) Whether, in the facts and circumstances of the case, the assessee was required to pay an amount equal to 8% or 10%, as the case may be, of the value of the exempted goods as per Rule 6(3)(b) of Cenvat Credit Rules, 2002/2004 as the common input (Hydrochloric Acid), was used for the manufacture of both dutiable goods (Gelatin) and exempted goods (Di-Calcium Phosphate) and the assessee was not maintaining separate accounts for the inputs used in dutiable goods and exempted goods?

(2) Whether, in the facts and circumstances of the case, the learned CESTAT has erred in law by allowing the appeal filed by the assessee and setting aside the order of the Commissioner after applying the Rules 57CC and 570 of erstwhile Central Excise Rules, 1944 which was effective till 28-2-2001 and no such

provisions exist in new applicable Rules viz., Cenvat Credit Rules 2002/2004?

2. The respondent-assessee is engaged in the manufacture of Gelatin and Di-Calcium Phosphate. The assessee was availing of the benefit of Cenvat Credit of duty paid on the inputs/raw materials consumed in the final products manufactured by it under Rule 3 of the Cenvat Credit Rules, 2002 (the Rules). The assessee was manufacturing two products namely, Gelatin and Di-Calcium Phosphate (Animal Feed Grade). Gelatin is classified under Chapter sub-heading No. 3503.00 (Rate of duty : 16%), and Di-Calcium Phosphate is classified under Chapter sub-heading No. 2303.00 (Rate of duty : Nil). The case of the revenue is that upon scrutiny of ER-1 for the month of April, 2004 to December, 2004 submitted by the assessee, it was revealed that the assessee had taken Cenvat Credit on Hydrochloric Acid used by it as common input in the manufacture of dutiable goods viz. Gelatin as well as Di-Calcium Phosphate. Upon verification of the ER-1 returns, it was revealed that during the period from April, 2004 to December, 2004, the assessee had cleared total quantity of 12746.300 MT of exempted goods viz. Di-Calcium Phosphate valued at Rs. 11,59,43,682/-. As per the First Schedule to the Central Excise Tariff Act, 1985, Gelatin attracts duty at the rate of 10% and Di-Calcium Phosphate (Animal Feed Grade) is an exempted product. The assessee had not maintained separate accounts for receipt, consumption and inventory of input viz. Hydrochloric Acid meant for use in the manufacture of dutiable product viz., Gelatin and exempted product Di-Calcium Phosphate in terms of sub-rule (2) of Rule 6 of the Rules. The assessee vide letter dated 8th December, 2004 had confirmed that it has not maintained separate accounts for receipt, consumption and inventory of Hydrochloric Acid. Accordingly, two show-cause notices dated 3rd February, 2005 and 23rd February, 2005 came to be issued to the assessee as to why the amount of duty specified therein should not be recovered under Rule 12 of the Rules, (now Rule 14 of the Cenvat Credit Rules, 2004) and as to why penalty under Rule 13 of the Rules (now Rule 15 of the Cenvat Credit Rules, 2004) read with the provisions of Rule 25 of Central Excise Rules, 2002 alongwith interest under the provisions of Section 11AB of the Act, as detailed in the show-cause notice should not be imposed. Both the show-cause notices came to be adjudicated vide common order dated 20th May, 2005 whereby a demand of Rs. 2,06,55,907/- came to be confirmed under Rule 12 of the Rules; penalty of Rs. 1,03,00,000/- came to be imposed under Rule 13 of the Rules, read with the provisions of Rule 25 of the Central Excise Rules with interest at the appropriate rate under the provisions of Section 11AB of the Act. Being aggrieved, the respondent carried the matter in appeal before the Tribunal, which came to be allowed vide the impugned order.

3. Assailing the impugned order of the Tribunal, Mr. Varun Patel learned Standing Counsel for the appellant submitted that common input Hydrochloric Acid was used in the manufacture of both Gelatin as well as Di-Calcium Phosphate, hence, in the light of the provisions of Rule 6(2) of the Cenvat Credit Rules, 2002, the respondent was required to maintain separate accounts for receipt, consumption and inventory of input meant for use in the manufacture of dutiable final

products and the quantity of input meant for use in the manufacture of exempted products and take Cenvat credit only on that quantity of input which was intended for use in the manufacture of dutiable goods. It was submitted that if the assessee was not in a position to maintain separate accounts for receipt, consumption and inventory of inputs, it could have followed the options as provided under sub-rule (3) of Rule 6 namely, to pay an amount as provided under sub-rule (3) of the value of exempted goods as Gelatin was liable to duty, whereas Di-Calcium Phosphate was an exempted product. It was submitted that the assessee having failed to maintain separate accounts as envisaged under sub-rule (2) of Rule 6, it was liable to pay the amount as prescribed under sub-rule (3) thereof in respect of the exempted goods. Since, the assessee had failed to do so, the adjudicating authority had rightly confirmed the demand for duty alongwith interest and penalty. It was submitted that as to whether Di-Calcium Phosphate is a by-product or a final product is completely irrelevant as in the present case there is no such distinction in the Cenvat Credit Rules, 2004. It was further submitted that in any case, Di-Calcium Phosphate is not a byproduct but a final product, which is cleared upon subjecting the phosphate solution to a manufacturing process. That Di-Calcium Phosphate is the result of a conscious effort on the part of the respondents inasmuch as the mother liquor (MCP Liquor), which arises during acidulation of bones, is specifically treated with lime to obtain Di-Calcium Phosphate. That, the respondent is availing Cenvat Credit of duty paid on Hydrochloric Acid and does not maintain separate records as stipulated under Rule 6(2) of the Rules despite the fact that Hydrochloric Acid being a common input is used in the process of manufacture of two products, one being gelatin and the other being Di-Calcium Phosphate.

4. Inviting attention to the impugned order of the Tribunal, it was submitted that the Tribunal has placed reliance upon the decision of the Bombay High Court in the case of *Rallis India limited v. Union of India*, 2009 (233) E.L.T. 301 (Bom.) whereby the decision of the Larger Bench in case of 2007 (115) ECC 124 has been set aside. It was submitted that the decision of the Bombay High Court in the case of *Rallis India Limited* (supra) was rendered in the context of Rules 57, 57C, 57CC and 57D of the Central Excise Rules, 1944 as were applicable to the facts of the said case. It was submitted that Bombay High Court has, in the facts of the said case, held that Mother Liquor arising in the manufacture of dutiable Gelatin was a waste and not an exempted final product, therefore, in the light of Rule 57D, the petitioner therein was entitled to entire credit availed and there was no obligation to reverse credit or pay presumptive amount under Rule 57CC. If rule 57CC was not applicable at the time of clearance of the waste Mother Liquor arising in the manufacture of Gelatin, then the rule could not be made applicable merely because the said waste Mother Liquor was utilized in the manufacture of exempted final product, viz. Phosphoryl "A" and "B". It was submitted that under the Cenvat Credit Rules, 2002, there is no corresponding provision like Rule 57D which exempts waste from payment of duty and as such, in the facts of the present case, the input in question being Hydrochloric Acid

having been utilized for the manufacture of dutiable as well as exempted final products, the respondent assessee was liable to pay a duty at an amount equal to 8% of the total price of the exempted final product.

5. The learned counsel has also placed reliance upon a decision of the Bombay High Court in the case of Commissioner of Central Excise, Thane-1 v. Nicholas Piramal (India) Ltd., 2009 (244) E.L.T. 321 (Bom.) wherein it has been held that hardship in maintaining accounts or following rules does not make the rules absurd or unjust. Rule 6(2) is mandatorily applicable once dutiable and exempted products are manufactured from common inputs and credit can be availed only in terms of Rule 6(3) of the Rules.

6. The undisputed facts of the case are that for the purpose of manufacture of Gelatin, cleared bone chips are charged to acidulation vats with the help of conveyors. Each vat is filled with pre-determined quantity of bone chips and then soaked with Hydrochloric Acid. The bones contain mineral matter like Phosphate Salts. The Hydrochloric Acid leaches out the phosphates forming Mono Calcium Phosphate. The phosphate solution commonly known as Mother Liquor is pumped out of the acidulation vats into precipitation tanks where lime solution is added which reacts with Mono Calcium Phosphate converting it into Di-Calcium Phosphate. Insofar as manufacture of Gelatin is concerned, after removal of Mother Liquor the demineralised bones are hydraulically transported to the washing section and thereafter processed further to manufacture Gelatin. The above manufacturing process shows that while soaking the bone chips in Hydrochloric Acid a waste product, viz., Mother Liquor ipso facto comes into existence. It is not as if there is a deliberate attempt on the part of the manufacturer to manufacture the Mother Liquor which emerges as a by-product during the course of manufacture of Gelatin. Moreover, it is not as if a particular quantity of Hydrochloric acid is used for the manufacture of Gelatin and a particular quantity is used for the production of Mother Liquor (whether ascertainable or unascertainable), the entire quantity of Hydrochloric acid in respect of which cenvat credit is availed of is used by the respondent for the manufacture of Gelatin. Considering the process of manufacture adopted by the respondent, it is not possible to manufacture Gelatin without corresponding production of Mother Liquor. This Mother Liquor which otherwise is in the nature of a waste product, is used by the respondent assessee for the manufacture of Di-Calcium Phosphate.

7. At this juncture, reference may be made to certain statutory provisions. Rule 6. of the Cenvat Credit Rules, 2002 makes provision for "Obligation of manufacturer of dutiable and exempted goods". Sub-rule (1) thereof provides that CENVAT Credit shall not be allowed on such quantity of inputs which is used in the manufacture of exempted goods, except in the circumstances mentioned in sub-rule (2). Sub-rule (2) provides that where a manufacturer avails of Cenvat Credit in respect of any inputs and manufactures such final products which are chargeable to duty as well as exempted goods, then, the manufacturer shall

maintain separate accounts for receipt, consumption and inventory of inputs meant for use in the manufacture of dutiable final products and the quantity of inputs meant for use in the manufacture of exempted goods and take Cenvat Credit only on that quantity of inputs which is intended for use in the manufacture of dutiable goods. Sub-rule (3) of Rule 6 makes provision for the conditions which a manufacturer of goods opting not to maintain separate accounts is required to follow.

8. Thus, on a plain reading sub-rule (1) of Rule 6, it is apparent that CENVAT credit is admissible in respect of the inputs used in the manufacture of dutiable goods and is inadmissible on such quantity of inputs which is used in the manufacture of exempted goods. Sub-rule (2) imposes an obligation on the manufacturer who manufactures final products and exempted goods from the common input to maintain separate accounts for receipt, consumption and inventory of inputs. Examining the applicability of the aforesaid rules to the facts of the present case, as noted hereinabove, it is not as if more quantity of Hydrochloric Acid is used than that required for manufacturing Gelatin or that by using a smaller amount of Hydrochloric Acid, the production of Mother Liquor could be averted. In the manufacturing process adopted by the assessee, it is not possible to manufacture Gelatin without Mother Liquor coming into existence. Thus, when the entire quantity of input viz. Hydrochloric Acid is used in the manufacture of the final product being Gelatin which is a dutiable product, the mere fact that a by-product emerges during the process would not bring the byproduct within the ambit of Rule 6 of the Rules so as to call for maintaining separate accounts in respect of the same. When the entire quantity of input is used in the manufacture of Gelatin, the question of maintaining separate accounts or of paying a percentage of the total price of the exempted goods would not arise. In the peculiar facts of the present case, sub-rule (1) of Rule 6, itself would not come into play inasmuch the manufacturer does not deliberately use any quantity of the inputs, viz. Hydrochloric Acid for manufacturing Mother Liquor, the entire Hydrochloric Acid is used in the manufacture of Gelatin. Thus, when no input is specifically used for the purpose of manufacturing Di-Calcium Phosphate, there would be no question of maintaining separate accounts for receipt, consumption and inventory of input.

9. At this stage, it may be germane to refer to the decision of the Supreme Court in the case of Commissioner of Central Excise, Mumbai Vs. National Organic Chemical Industries Limited, wherein the question before the Supreme Court was as to whether emergence of methane and ethane during the course of manufacture of ethylene and propylene would be a ground for denial of benefit of exemption in respect of ethylene and propylene which was exempt from excise duty. It was contended on behalf of the respondent-assessee that there was no way by which the respondent could have manufactured ethylene and propylene for producing ethane and methane. The Court held that it was not as if by using a smaller quantity of raw materials or other goods involved in the process, the respondent could have averted the emergence of ethane and methane. In other

words, in the technology utilized for the manufacture of ethylene and propylene, the emergence of ethane and methane was inevitable. Hence, while it was no doubt correct to say that ethylene and propylene had been used in or in relation to manufacture of ethane and methane, the identical quantity of the same goods had simultaneously been used in the manufacture of ethylene and propylene. The emergence of ethane and methane therefore, by itself, was not a ground to deny the benefit of the exemption notification.

10. In the facts of the present case, it is not as if by using a smaller quantity of input Hydrochloric Acid, the respondent could have averted the emergence of Mother Liquor. In other words, in the technology utilized by the respondent for the manufacture of Gelatin, the emergence of Mother Liquor was inevitable. Hence, while it is no doubt correct to say that Hydrochloric Acid has been used in or in relation to manufacture of Mother Liquor, the identical quantity of the same goods has simultaneously been used in the manufacture of Gelatin. The emergence of Mother Liquor during the course of manufacture of Gelatin, therefore, by itself is not a ground to invoke the provisions of Rule 6 of the Rules.

11. Under the Scheme of the Central Excise Act and the Rules framed thereunder, credit of the duty paid on inputs used in the manufacture of dutiable goods is given under the Cenvat Credit Rules so as to prevent the cascading effect of duty. Cenvat Credit is availed in respect of duty paid on the inputs used in the manufacture of final product. At the time of clearance of the goods, the amount of credit being availed would be used for the payment of excise duty. (sic)us, the credit availed at the first stage would stand recovered at the time of clearance of the exportable goods. In the facts of the present case, Cenvat Credit would have been availed in respect of the input Hydrochloric Acid. The entire Hydrochloric Acid having been used for the manufacture of excisable goods being Gelatin, the credit availed in respect of the inputs would be duly recovered at the time of clearance of the excisable goods being Gelatin. If, as contended on behalf of the revenue, the respondent would be liable to pay a percentage of the cost of the final exempted product being Di-Calcium Phosphate, the respondent would be required to pay duty in respect of the same input utilized by it twice over, which would apparently result in unjust enrichment to the revenue.

12. On behalf of the appellant it has been submitted that common input Hydrochloric Acid was used in the manufacture of both Gelatin as well as Di-Calcium Phosphate hence, in the light of the provisions of Rule 6(2) of the Cenvat Credit Rules, 2002, the respondent was required to maintain separate accounts for receipt, consumption and inventory of input meant for use in the manufacture of dutiable final" products and the quantity of input meant for use in the manufacture of exempted products and take cenvat credit only on that quantity of input which was intended for use in the manufacture of dutiable goods. In the present case, the assessee has taken cenvat credit only on that quantity of input, which was intended for use in the manufacture of dutiable goods, therefore, also the question of invoking sub-rule (2) of Rule 6 of the Rules

would not arise.

13. Insofar as reliance placed upon the decision of the Bombay High Court in the case of Commissioner of Central Excise, Thane-1 v. Nicholas Piramal (India) Ltd. (supra) is concerned, the same would have no applicability to the facts of the present case inasmuch as in the facts of the said case, common input had been consciously used in the manufacture of two final products, whereas in the facts of the present case, the input Hydrochloric Acid is used for the manufacture of Gelatin alone, however during the course of manufacturing process a byproduct viz. Mother liquor also emerges.

14. In the light of the view taken by the Court, it is immaterial as to whether or not the new applicable rules, viz., Cenvat Credit Rules, 2002/2004 contain any provisions akin to Rule 57CC and Rule 57D of the erstwhile Central Excise Rules, 1944.

15. For the reasons recorded hereinabove, this Court does not find any legal infirmity in the impugned order of the Tribunal so as to warrant interference. No question of law, much less a substantial question of law can be stated to arise out of the impugned order of the Tribunal. The appeal is, accordingly, dismissed.