

(2001) 02 MP CK 0052
In the Madhya Pradesh High Court
Case No : C.E.R. No. 74 of 2000

Commissioner of C. Ex.

APPELLANT

Vs

Bharat Heavy Electricals Ltd.

RESPONDENT

Date of Decision : 14-02-2001

Acts Referred:

Central Excise (Amendment) Rules, 2002 — Rule 3, 4
Central Excise Rules, 1944 — Rule 57(1), 57A, 57B, 57F(1), 57F(2)
Central Excises and Salt Act, 1944 — Section 35H(1)

Citation : (2004) 167 ELT 265

Hon'ble Judges : Bhawani Singh, C.J.; Arun Mishra, J

Bench : Division Bench

Advocate : Indira Nair, for the Appellant;

Final Decision : Dismissed

Judgement

Arun Mishra, J.—Present petition has been filed under Sub-section (1) of Section 35H of the Central Excise Act, 1944 to direct the Customs, Excise & Gold (Control) Appellate Tribunal (hereinafter referred to as "CEGAT") to refer the question of law to this Court for decision :

I. Whether in facts and circumstances of the case, the tribunal was correct in allowing adjustment of duty paid under Rule 57F(1)(ii) from the whole demand when on the contrary the Tribunal themselves held that the party intentionally adopted the modus operandi of clearing the goods under Rule 57F(1)(ii) to evade payment of duty.

II. Whether the Tribunal was correct in allowing credit in respect of foundry chemicals, Hydraulic Jacks, Transformers, under Rule 57A of Central Excise Rules, when the items are not inputs in terms of Rule 57A of the Central Excise Rules, 1944.

2. The respondent M/s. Bharat Heavy Electricals Ltd., Piplani, Bhopal, (hereinafter referred to as "BHEL") is the manufacturer of items falling under

Chapters 84 and 85 of Central Excise Tariff Act, 1985. BHEL procured inputs and cleared them on payment of duty under Rule 57F(1)(ii) for job work i.e. for further processing and on return of the goods from job workers/SSI units, the BHEL took a "higher notional credit" which was available under Rule 57B of Central Excise Rules on inputs received from SSI Units availing benefit of concessional rate of duty under Notification No. 175/86, dated 1-3-1986. The Revenue was of the view that the BHEL in order to avail undue benefit of higher notional credit of excise duty on inputs received from SSI Units had adopted a modus operandi to send to the job worker inputs on payment of duty under Rule 57F(1)(ii) of Central Excise Rules, instead of supplying them the inputs for job work under Rule 57F(2) of the Rules where no duty payment was required on initial clearance to job worker/SSI Units. Thus, the provisions of Rule 57F(2) read with Rule 57B of the Central Excise Rules were misused as BHEL cleared the inputs for processing under Rule 57F(1)(ii) on payment of duty and on receipt back of processed goods have taken credit of duty paid at enhanced rate, whereas no duty was required to have been paid by the job worker/SSI Units under the provisions of Rule 57F(2) of Central Excise Rules, resulting in such availment of higher notional credit by the BHEL. Show cause notices were issued for disallowance of such higher notional credit by the BHEL. It was also alleged in the show cause notices that it has availed wrong Modvat credit under Rule 57A of the Rules for the reasons that (i) Original duty paying documents were not produced before Excise Authorities (ii) the duty paying document does not contain payment particulars or not pre-authenticated or not in the name of party (iii) some items on which Modvat credit under Rule 57A was taken were actually not inputs used in or in relation to manufacture of final product. The extended period as provided under proviso to Section 11A was also invoked to adjudicate the matter. Six show cause notices were issued. The said notices were adjudicated by the Commissioner, Central Excise, Bhopal vide order dated 27-2-99 as under :

(1) In respect of show cause notice dated 2-6-88, Higher Notional Credit of Rs. 8,10,535.73 paise was disallowed under Rule 57-I of the Rules. Modvat credit of Rs. 2,21,132.00 was allowed but Modvat credit of Rs. 7,65,639.38 disallowed. Penalty of Rs. 8,10,536.00 was imposed u/s 11AC.

(2) In respect of show cause notice dated 21-7-88, Higher Notional Credit of Rs. 7,22,783/- has been disallowed under Rule 57-I of Rules. Modvat credit of Rs. 58,221.00 was allowed but Modvat credit of Rs. 3,89,558.35 was disallowed. Penalty of Rs. 7,22,783.00 was imposed u/s 11AC.

(3) In respect of show cause notice dated 11-7-90, Higher Notional Credit of Rs. 54,45,598.00 has been disallowed under Rule 57-I of Rules. Modvat credit of Rs. 40,16,698.76 was allowed but Modvat credit of Rs. 8,02,582.19 was disallowed. Penalty of Rs. 54,45,598.00 was imposed u/s 11AC.

(4) In respect of show cause notice dated 13-2-92, Higher Notional Credit of Rs. 8,88,543.00 has been disallowed under Rule 57-I of Rules. Penalty of Rs.

8,88,543.00 was imposed u/s 11AC.

(5) In respect of show cause notice dated 22-11-91, whole demand was dropped on the ground that the demand was time barred.

(6) In respect of show cause notice dated 28-11-91, Higher Notional Credit of Rs. 3,69,835.00 was disallowed. Modvat credit of Rs. 20,26,525.00 was allowed. Penalty of Rs. 3,69,835.00 was imposed u/s 11AC.

The Commissioner imposed penalty of Rs. 1 crore on BHEL under Rule 173Q of the Central Excise Rules, 1944. The BHEL preferred five separate appeals before the CEGAT. These appeals were decided finally on 28-9-2000. CEGAT came to the conclusion that the demands were not hit by limitation and that extended period as provided u/s HA of the Central Excise Act came to rescue of the department. The benefit of the Higher Notional Credit was not available to the BHEL, It ordered the adjustment of the duty paid at the time of clearing the goods under the provisions of Rule 57F(1)(ii) from the total credit of Higher Notional Credit taken by the BHEL and differential duty was directed to be paid on recomputation. The penalty u/s 11AC of the Act was quashed as Section 11AC was enacted w.e.f. 28-9-96 prospectively and demands were pertaining to period from August 1987 to December 1991. In the facts and circumstances of the case penalty of Rs. 1 crore was reduced to Rs. 10 lakhs. CEGAT also allowed Modvat credit on Foundry chemicals, Hydraulic Jack, Ramming mass and 50 KVA Transformer.

3. The Revenue has confined its challenge with respect to Modvat credit and with respect to adjustment of duty paid under Rule 57F(1)(ii) from the whole demand. Allowance of Modvat credit in respect of (a) Foundry chemicals (b) Hydraulic Jack (c) Transformer has been questioned. It submits that payment of adjustment or duty on clearance of inputs was not an issue before the CEGAT, Hence, such adjustment could not be ordered and with respect to Modvat credit on foundry chemicals, it is the case of the Revenue that BHEL have used them for manufacture of sand moulds which was in the nature of equipment and not directly or indirectly used as input for manufacture of final products. Hence, in view of the definition of input under Rule 57A, credit of the duty paid on such item is inadmissible.

4. With respect to Hydraulic Jacks, it is submitted that they are spares of machinery and other appliances and credit of duty paid on the items was not available to the assessee under Rule 57A of the Rules as the Hydraulic Jacks are not input and credit on capital goods was not available. Hydraulic Jacks are used in handling transformers. Hydraulic Jacks being handling equipments are not inputs. The transformers are equipments used for supplying electricity to the machines and clearly not inputs. Hence, no Modvat credit was inadmissible.

5. With respect to first question whether Tribunal was correct in allowing adjustment of duty paid under Rule 57F(1)(ii) from the whole demand in view of the conduct of BHEL. The Tribunal has found that BHEL did not follow the correct

procedure and took unintended benefit by taking higher notional credit. But, the fact remains that at the time of clearing the goods under the provisions of Rule 57F(1)(ii), BHEL had paid duty on the inputs. The orders were passed by the Revenue on the ground that they are not entitled to adjustment on such duty paid. The direction of the Tribunal cannot be said to be unfair to the Revenue that BHEL be given adjustment of the duty paid from the total credit on the Higher Notional Credit taken by them. As a matter of fact it is a case where only differential duty could be realized by the Revenue. Even if its case is accepted it cannot be said to be entitled for duty under both the provisions. Thus, the demands which are raised by Revenue definitely needed recomputation as the demand covers the entire duty taken as credit of higher notional duty without giving the assesses the benefit of credit reversed at the time of clearing the inputs. The only submission raised by learned counsel for the revenue that this was not the question to be decided by the CEGAT. We are unable to accept the submission as the question which arose clearly for decision was that what duty the Revenue could realize and when duty was paid earlier which was not payable definitely same has to be counted while reversing higher notional credit availed and no illegality has been committed by the CEGAT while ordering differential duty to be worked out.

6. The other question which has been raised before us is whether the foundry chemicals are modvatable items or not ? In this regard, it is not in dispute that the foundry chemicals are used in manufacture of sand moulds. The Apex Court had considered in the case of Collector of Central Excise, Baroda Vs. M/s. Ambalal Sarabhi Enterprises (P) Ltd., , a case of starch hydrolysate, considering the nature of the goods being highly unstable and quickly fragmentable and losing its character in a couple of days, it was held by their Lordships that it cannot be said that same could be marketed and therefore it was not dutiable goods. In the instant case BHEL was claiming Modvat credit of duty paid on foundry chemicals which are used for the purpose of making sand moulds. The duty being utilized for payment of excise duty on the final product. The BHEL manufactures various excisable goods including mechanical and electrical appliances falling under Chapters 84 and 85 of the Central Excise Tariff Act, 1985. Sand mould is formed when sand is rammed against a pattern, whether the sand is confined within a box or not, and where a hollow is created for pouring molten metal, sand mould is an exempted item by the Government. It is not the case of Revenue that sand mould is a marketable item. Sand mould operation consists merely of temporary use of sand, along with chemicals and resin to create a core for the purpose of pouring molten metal. Sand mould, thus, cannot be said to be a marketable goods.

7. The question which further arises is where the foundry chemical used by BHEL, sand mould could be said to be input for manufacture of final product under Rule 57A of Central Excise Rules credit has to be allowed on inputs to say "goods used in or in relation to the manufacture of the said final product". The Rule 57A application cannot be confined to raw materials which requires to be

consumed and actually converted into a final product. The word "input" has been used in the sense of goods used in or in relation to manufacture of final product. The term in relation to manufacture of final product has expanded meaning has to be given effect to.

8. The Supreme Court in case of J.K. Cotton Spinning and Weaving Mills Co. Ltd. Vs. Sales Tax Officer, Kanpur and Another, considered the question whether items like coal, lime, cement, textile design block could be said to have been used in the manufacture of yarn. The Supreme Court held that manufacture of goods should normally encompass the entire process carried on by the dealer of converting raw materials into finished goods, and where any particular process is so integrally connected with the ultimate production of goods that, but for that process, manufacture of processing of goods would be commercially inexpedient, that process would fall within the expression "in relation to manufacture of final product".

9. The Apex Court in case of Indian Copper Corporation Limited Vs. Commissioner of Commercial Taxes, Bihar and Others, had also taken the view that locomotives and motor vehicles used to transport ore from the mines to the factory to enable ore being converted into copper products, can be said to be used in the manufacture of copper products.

10. In case of Collector of Central Excise, Calcutta-II Vs. Eastend Paper Industries Ltd., it was held by the Apex Court that anything that enters into and forms part of process of manufacture or is required to make the article marketable must be deemed to be raw material or component part of the end product and must be deemed to have been used in completion or manufacture of the end product.

11. The foundry chemicals need not necessarily be used in the manufacture of the final product, but, they are definitely used "in relation to the manufacture" of the final product. The words "in relation to the manufacture" has wider connotation when raw-material is actually used in the physical or chemical process of manufacture, such material has to be treated as inputs used in the manufacture of final product. Foundry chemical has significant role in the manufacture of final product. The foundry chemical is used in manufacture of the sand mould which in turn helps bringing for the final product. Thus it can be safely concluded that sand mould is used in relation to manufacture of final product.

12. With respect to Hydraulic Jack, the finding which has been arrived at that it is a material handling equipment, therefore, it will be eligible to Modvat credit, is not shown to be perverse in any manner, more so in view of decision of Apex Court in Collector of Central Excise v. Eastend Paper Industries Ltd. (supra).

13. Learned counsel has orally submitted with respect to ramming mass, but, we find that reference has not been prayed in the application on that count. Hence, we cannot entertain such submission.

14. With respect to transformer, the same is used for controlling the supply of electricity at particular voltage, hence, the equipment for generation of electricity has been rightly held to be modvatable item.

15. We find no illegality in the order of the Tribunal requiring it to refer the questions of law for decision to this Court. The petition for seeking reference sans merits and is dismissed.