(2009) 10 BOM CK 0114

In the Bombay High Court

Case No : Central Excise Appeal No. 35 of 2007 with C.E.A. No. 13 of 2008 On appeal from 2007 (220) E.L.T. 471 (Tri. - Mumbai)

Commissioner of C. Ex.	APPELLANT
Vs	
Indorama Textiles Ltd.	RESPONDENT

Date of Decision : 09-10-2009

Acts Referred:

Central Excise Rules, 2002 — Rule 11, 57A(1), 57AE(1), 57B, 57B(1)
Central Excises and Salt Act, 1944 — Section 35G(1)
CENVAT (Credit) Rules, 2002 — Rule 2, 3, 4, 4(5), 7

Citation : (2010) 260 ELT 382

Hon'ble Judges : F.M. Reis, J;B.P. Dharmadhikari, J

Bench : Division Bench

Advocate : S.K. Mishra, ASGI, for the Appellant; Vikram Nankani and R.D. Wakode, for the Respondent

Final Decision : Dismissed

Judgement

B.P. Dharmadhikari, J.—In both these Appeals filed u/s 35-G(1) of the Central Excise Act, 1944, challenges are to orders passed by Respondent No. 2-Customs, Excise and Services Tax Appellate Tribunal, Mumbai, on 19-6-2007 (No. A/67/2007/EB/C-II) in Appeal No. E/3220/04-Mum. [2007 (220) E.L.T. 471 (Tribunal)] arising out of order-in-Original No. 47/2004/C dated 30-7-2004 passed by the Commissioner of Central Excise and Customs, Nagpur and on 31-1-2007 (No. A/464/2007/EB/C-I) in Appeal No. E/3701/05-Mum. arising out of order-in-Original No. 14/2005/C. dated 8-8-2005 passed by the Commissioner of Central Excise and Customs, Nagpur. The dispute is about CENVAT credit of duty paid for furnace oil meant for generation of electricity. The Appellants contend that as that furnace oil is never received in the factory of production but goes directly to job worker and as Respondent does not have any captive power plant, CENVAT credit is not available on it.

2. The facts are not in dispute. Yarn business i.e. part of business activity of

Indorama Synthetics Ltd. (M/s. IRSL) came to be transferred to noticee, Respondent No. 1 herein. Earlier entire business was with one owner & had a captive power plant and after transfer and separation physically by putting up a wall, said captive power plant remained on side of and with M/s. IRSL. Respondent No. 1 does not have any separate captive power plant and storage tanks for storing furnace oil are also with the job worker M/s. Indorama Synthetics Ltd i.e M/s. IRSL. Furnace Oil is received in the name of M/s. IRSL and it availed of CENVAT credit. At regular intervals part of furnace oil was then transferred to separate tank in the premises of M/s. IRSL only but meant for Respondent No. 1. From this tank the furnace oil was being used for generation of electricity. According to Appellants electricity generated was by drawing oil from both tanks and was distributed in pre-decided ratio between M/s. IRSL and Respondent No. 1. M/s. IRSL issued Invoice under Rule 11 of Central Excise Rules, 2002, for quantity of furnace oil transferred to the separate tank of Respondent No. 1 and thereafter, Respondent No. 1 in turn availed CENVAT credit on its strength.

3. Appellants found it in contravention of Rule 2, 3, 4 and 7 of erstwhile CENVAT Credit Rules, 2002 and of 2004 for the period from 1-4-2003 -- 3-12-2004. After hearing, credit of duty amounting to Rs. 1,17,02,115/- was found to be ineligible and a penalty of Rs. 15,00,000/- was also imposed vide order dated 30-7-2004. In other matter, for the period from 1-1-2004 -- 30-9-2004 credit of Rs. 1,13,17,607/- was found to be wrongly availed and penalty amount of Rs. 15,00,000/- was also imposed vide order dated 8-8-2005. The amounts were to be recovered along with interest. Both these orders of Commissioner of Central Excise and Customs were then assailed in appeals before CESTAT, who set aside the same. Thereafter present Appeals have been filed.

4. The contention of Adv. S.K. Mishra, learned ASGI, is that Respondent No. 1 is not generating electricity and hence, furnace oil is not an input for it. According to him, as Respondent No. 1 does not have any captive power plant, M/s. IRSL who supply electricity to it cannot be treated as the job worker and input as such is never received back by Respondent No. 1 from the job worker. No excisable finished or intermediate product comes up at the premises of alleged job worker and electricity is not such excisable product. He states that furnace oil was being sold to Respondent No. 1 and said Respondent took CENVAT credit of duty paid on furnace oil transferred during previous month in subsequent month. Furnace oil was being consumed for producing electricity which was used in the establishment/industry of alleged job worker and Respondent No. 1. He has taken us through the impugned order and according to him, the following questions arise for determination:

(a) Whether Respondent No. 2 Tribunal is right in holding that the furnace oil used as fuel is covered by main definition of inputs under Rule 2(g) of CENVAT Credit Rules and credit has been correctly availed by Respondent No. 1 though furnace oil was never received in factory of said Respondent?

(b) Whether Tribunal is right in holding that furnace oil is an input because of provisions of Rule 4(5) of CENVAT Credit Rules, 2002 and Circular 637/28/2002-CX., dated 8-5-2002 especially when it was not used in manufacture of intermediate products by the job worker or goods sent to job worker were not partially processed and were not sent for further processing, testing, repair, reconditioning or for any other purpose.

5. Adv. Nankani for Respondent No. 1 supports the impugned order and contends that furnace oil need not be used within factory of production. According to him, purchase of part of business of M/s. IRSL and of furnace oil as fuel by Respondent No. 1, separate storage tanks for said fuel with M/s. IRSL and receipt by Respondent No. 1 of electricity produced from it by said job worker within period of 180 days are the facts not in dispute. He places strong reliance upon judgment of Hon''ble Apex Court reported at Vikram Cement Vs. Commnr. of Central Excise, Indore, to urge that issue is squarely covered by said judgment. He, therefore, states that no substantial question of law arises and Appeals as filed need to be dismissed.

6. In Vikram Cement v. Commissioner of Central Excise, Indore the reference was made to Larger Bench of Hon''ble Apex Court in the factual context of the Appellants there availing of CENVAT credit on explosives and other inputs used in quarrying limestone, which was in turn used for the manufacture of cement and clinkers. The limestone mines of said Appellants were situated at some distance away from the factory premises of the Appellants. The Adjudicating Authority held that the Appellants were not entitled to the credit availed of by the Appellants and raised a demand for excise duty only on the explosives. The narrower question raised in appeal, therefore, was found to be whether the adjudicating authority was correct in denying the Appellants the CENVAT credit on the inputs. Hon''ble Apex Court has interpreted provisions of Rule 57-B and extent of words "within the factory of production" particularly in Clause (1)(iv) is being heavily relied upon by Respondent No. 1 to urge that use of furnace oil need not be within its factory. Those observations are:

4. We observe that Rule 57-B commences with a non-obstante clause. It allows credit to be taken by a manufacturer on inputs used in or in relation to the manufacture of the final products whether directly or indirectly and whether contained in the final products or not. There is no qualification as to where the inputs must be used in the main body of Sub-rule (1). Qualifications have been introduced to the extent stated in Clauses (i) to (vi) read with the Explanation. Thus Clause (i) provides for inputs which are manufactured and used within the factory of production. Paints, fuel, packing materials and accessories are also treated as inputs under Clauses (ii), (iii), (v) and (iv) without any requirement for user within the factory. Clause (iv) provides for credit on inputs used for generation of electricity or steam used for manufacture of the final products or for any other purposes "within the factory of production". It appears to us on a plain reading of the Clause that the phrase "within the factory of production"

means only such generation of electricity or steam which is used within the factory would qualify as an intermediate product. The utilization of inputs in the generation of steam or electricity not being qualified by the phrase "within the factory of production" could be outside the factory. Therefore, whatever goes into generation of electricity or steam which is used within the factory would be an input for the purposes of obtaining credit on the duty payable thereon. As far as the Explanation is concerned, the inputs are restricted to inputs notified under Rule 57-A. There is no dispute that both explosives and limestone are notified u/s 57-A for manufacture of the final product viz. cement.

7. Rule 57-F(4) permits removal of inputs as inputs or after they have been partially processed by manufacturer of final product. Rule 57-J(2) permits manufacturer of final product to take credit under its Sub-rule (1) only if the intermediate products are manufactured in the factory as a job work in respect of which the exemption contained in notification of Government of India in Ministry of Finance (Department of Revenue) No. 214/86-Central Excise, dated 25/3/1986 has been availed of. This notification finds mention in paragraph 17 of judgment of Hon''ble Apex Court. In facts before Hon''ble Apex Court, inputs were being used by manufacture of final product but not within the factory of production. Hon''ble Apex Court upheld its earlier view in case of M/s. Jaypee Rewa Cement Vs. Commissioner of Central Excise, M.P., to conclude that Rule 57A(1) did not require inputs to be utilised in factory premises. Consideration in paragraph 16 of judgment shows that credit is permissible in respect of intermediate goods received from a job worker on or after 1-4-2000. Credit can be allowed only if the intermediate products received by the manufacturer of the said final products are accompanied by any of the documents as specified under Rule 57-AE(1) evidencing the payment of duty on such inputs of capital goods. Rule 57-AB introduced for restoring benefit granted earlier under Rule 57-J is held to be effectively duplicating the substance of Rule 57-J(1) and (2) and dealing with a situation where inputs are received by a job worker for production of intermediate goods which are used in the manufacture of a final product. Following conclusions reached in paragraph 24 are important: "24. The Schemes of MODVAT and CENVAT Credit are not, therefore, different and we are unable to agree with the conclusion of the Court in J.K. Udaipur Udyog that the decision in Jaypee Rewa Cement (supra) would have no application to CENVAT Rules."

8. The fact of electricity being intermediate goods used in manufacture of final product by Respondent No. 1 is not in dispute before us. It is nowhere contended that M/s. IRSL cannot be a job worker and generation of electricity cannot be outsourced. When it can be outsourced, it also follows that Respondent No. 1 need not have a captive power plant. Only contention is fuel oil is not received in factory of production or/and is not being used or processed any time within factory of production. It is apparent that said issue stands concluded by the above-mentioned judgment of Hon''ble Apex Court and there is no change of law in this respect. It is also clear that inputs or raw material can be directly forwarded to job worker for production of intermediate goods. There is no

challenge to understanding/agreement between Respondent No. 1 and M/s. IRSL. We do not find anything perverse in findings recorded in paragraph 6 of the order No. A/67/2007/EB-C-II, dated 31-1-2007 in Appeal No. E/3701/05-Mum. These reasons hold good even for second matter.

9. No substantial question of law, therefore, arises at least in present facts in any of these Appeals. Both Central Excise Appeals are accordingly dismissed with no orders to costs.

