(2013) 01 GUJ CK 0097

In the Gujarat High Court

Case No : Tax Appeals No''s. 839, 840 to 846 of 2012 with Civil Applications No''s. 397 to 404 of 2012

Commissioner of Central Excise and Customs — APPELLANT

Vs

Anil Products Ltd. — RESPONDENT

Date of Decision : 09-01-2013

Acts Referred:
Central Excises and Salt Act, 1944 — Section 11AC

Citation : (2013) 18 GSTR 583

Hon'ble Judges : S.G. Gokani, J;Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Y.N. Ravani, for the Appellant; Devan Parikh with Nirav P. Shah, for the Respondent

Judgement

Akil Kureshi, J.—These tax appeals along with the companion civil applications for stay arise out of common background and they have been heard together and are being disposed of by this common order. For the purpose of this order, we may notice the facts as recorded in Tax Appeal No. 839 of 2012. The respondent is a manufacturer and is manufacturing various products such as, dextrose/ anhydrus dextrose/liquid glucose, sorbitol solution and plain and modified starch which are classified under different chapter headings under the Central Excise Tariff Act, 1985. For manufacture of such goods, the respondent uses duty-paid inputs and avails of benefits of Cenvat credit as per the provisions of the Cenvat Credit Rules, 2004. It is an admitted position that the respondent also clears certain other by-products/wastes, viz., ridgent (hydrol) and corn extractives (com steep liquor, bio feed ez and bio feed). On the premise that such by-product/waste is exempt from payment of duty and that therefore Cenvat credit could not have been availed of on the inputs used for manufacturing such goods, the adjudicating authority issued the show-cause notice dated May 26, 2010 and called upon the respondent why:

(i) the amount of Rs. 4,31,573 being equal to ten per cent. on the value of the exempted goods cleared during the period May, 2009 to June, 2009 which was not paid by them as required under rule 6(3)(i) of the Cenvat Credit Rules, 2004, should not be recovered from them under rule 14 of the Cenvat Credit Rules, 2004, read with section 11A of the Central Excise Act, 1944.

(ii) penalty should not be imposed upon them under rule 13(1) of the Cenvat Credit Rules, 2004, read with the provisions of section 11AC of the Central Excise Act, 1944, and

(iii) interest at the prescribed rate should not be charged from them under the provisions of section 11AB of the Central Excise Act, 1944, read with rule 14 of the Cenvat Credit Rules, 2004.

2. Few other show-cause notices along the same lines were also issued.

3. The respondent opposed the show-cause notice and participated in the Departmental proceedings. The prime contention of the respondent was that the above noted exempt products were mere by-products or waste arising out of the manufacturing of the principal products. Merely because such waste was exempt from payment of duty would not disentitle from claiming the benefit of Cenvat credit on the inputs as per rule 6 of the Cenvat Credit Rules, 2004. The respondent also contended that proportionately, the entire Cenvat credit availed of on manufacturing of such by-products/ waste was reversed along with interest. The adjudicating authority, however, passed the order-in-original dated October 26, 2010, in which he passed a common order disposing of various show-cause notices and confirmed the total duty demand of Rs. 16,86,914 with interest and also imposed penalty of matching amount u/s 11AC of the Central Excise Act, 1944.

4. The respondent, therefore, preferred an appeal against the said order before the Commissioner, who by his order, dated January 31, 2011 dismissed the appeal, upon which the respondent approached the Customs, Excise and Service Tax Appellate Tribunal ("the Tribunal", for short). The Tribunal by the impugned order dated May 29, 2012, allowed the appeal and reversed the orders passed by the excise authorities relying on the decision of the Bombay High Court in the case of Rallis India Ltd. v. Union of India (2009) 233 ELT 301 (Bom) and that of this court in the case of Commissioner of C. Ex. and Customs, vadodara-I Vs. Sterling Gelatin, .

5. The learned counsel for the Department strenuously urged before us that the decisions of the Bombay High Court and the Gujarat High Court noted above are clearly distinguishable. In the present case, the respondent-assessee not only manufactured its principal product, but also intentionally produced other products which were produced regularly and were also sold in the market. Such products had market value and were classified under different chapter headings of the Central Excise Tariff Act, 1985. The counsel, therefore, contended that this is not a case of mere by-product or waste which comes into existence while carrying out the principal manufacturing activity of producing sorbitol, etc. The

counsel relied on a decision of the Bombay High Court in the case of CCE v. Nicholas Piramal (India) Ltd. (2010) 3 GSTR 163 (Bom) : (2009) 244 ELT 321 (Bom). He also relied on the decision of the apex court in the case of Commissioner of Sales Tax, Bombay Vs. Bharat Petroleum Corporation Ltd., , wherein observing that there is no evidence on record to suggest that the by-product is not a commercial commodity with a market but is a mere item of waste, further taking into account that such subsidiary product was turned out regularly and continuously in the course of manufacturing business and was also sold regularly from time to time, held that an intention can be attributed to the manufacturer to manufacture and sell not merely the main item manufactured, but also subsidiary products.

6. On the other hand, learned counsel, Shri Devan Parikh for the respondents opposed the appeals contending that the Tribunal committed no error. The entire situation is covered by the decisions of the Bombay High Court in the case of Rallis India Ltd. (2009) 233 ELT 301 (Bom) and of this court in the case of Commissioner of C. Ex. and Customs, vadodara-I Vs. Sterling Gelatin, . The counsel further relied on the Departmental circular dated April 3, 2000 wherein it was clarified that Cenvat credit would be admissible on the part of inputs that is contained in the waste or the refuse or the by-product.

7. The counsel further submitted that in the show cause itself the by-product is referred to as waste. The Department, therefore, now cannot take a different stand and contend that such product was a subsidiary product intentionally manufactured by the respondents.

8. The counsel further relied on the decisions of this court in the case of Commissioner of Central Excise Vs. Ashima Dyecot Ltd., and in the case of The Commissioner of Central Excise Vs. Maize Products, to contend that once the credit utilisation has been reversed, there would thereafter be no scope for taking out proceedings for breach of rule 6 of the Cenvat Credit Rules, 2004.

9. Having heard the learned counsel for the parties, we may notice that the adjudicating officer in the show-cause notice relied heavily on the decision of the larger Bench of the Tribunal in the case of Rallis India (2007) 208 ELT 25 (Trib.-Mum) [LB], to hold that the statutory provision has undergone a material change in rule 6 of the Cenvat Credit Rules, 2004 as compared to rule 57D of the Central Excise Rules, 1944. In his opinion, in the subsequent legislation, distinction between by-product, waste, reject and residue was totally eliminated. He, of course, referred to the Departmental instructions which came to be issued in the wake of such changed statutory provisions, however, opined that when the issue was considered by the larger Bench of the Tribunal, there would, thereafter, be no further controversy possible.

10. We may record that the said decision of the Tribunal in the case of Rallis India Ltd. (2007) 208 ELT 25 (Trib.-Mum) [LB] came to be reversed by the Bombay High Court in the case of Rallis India Ltd. (2009) 233 ELT 301 (Bom).

11. Further, this court had an occasion to consider such decision in a very similar situation as we are concerned in the case of Commissioner of C. Ex. and Customs, vadodara-I Vs. Sterling Gelatin, . It was a case wherein the manufacturer was manufacturing gelatine and dicalcium phosphate as its main products. In the manufacturing process, certain by-products/waste were also manufactured. The Department contended that in view of rule 6(2) of the Cenvat Credit Rules, 2004, credit for the inputs utilised for manufacturing of the by-product would not be available since such by-product was duty exempt. This court examining such rule position and referring to various decisions including that of Rallis India Ltd. (2009) 233 ELT 301 (Bom) of the Bombay High Court opined as under :

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 utilised 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 of 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 of would be used for the payment of excise duty. Thus, the credit availed of 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 of 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 of 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 dicalcium phosphate, the respondent would be required to pay duty in respect of the same input utilised by it twice over, which would apparently result in unjust enrichment to the Revenue.

We also had an occasion to refer to and follow the decisions of this court in the case of Commissioner of C. Ex. and Customs, vadodara-I Vs. Sterling Gelatin, and in the case of Commissioner of C. Ex., Ahmedabad-III Vs. Nirma Ltd., .

12. The factual ground and the statutory provisions applicable being similar, we have no hesitation in upholding the decision of the Tribunal. We may, however, clarify that in the present case, there is no material to suggest that the respondent manufactured any subsidiary products with an intention to market

them regularly and consistently and that it was also the case of the Department that in the process of manufacturing the principal product, certain waste/by-product came into existence. We are informed by the counsel for the respondent that the value of such waste/by-product was minuscule and that therefore also no intention can be gathered on the part of the manufacturer to manufacture and market such products as subsidiary product. We have also noticed that the respondents have voluntarily reversed the Cenvat credit utilised for manufacturing the by-product along with interest.

13. On the above basis, we are inclined to uphold the decision of the Tribunal leaving the contention of the counsel for the Revenue that if there is any apparent intention to manufacture not only the principal product but the subsidiary product, the decision of this court in the case of Commissioner of C. Ex. and Customs, vadodara-I Vs. Sterling Gelatin, may not apply, open to be considered in future. The appeals stand disposed of accordingly. In view of disposal of the appeals, the civil applications do not survive. They are also disposed of accordingly.

