

(2013) 01 MAD CK 0260

In the Madras High Court

Case No : Civil Miscellaneous Appeal (NPD) No. 2465 of 2011 and M.P. No. 1 of 2011

Commissioner of Central Excise

APPELLANT

Vs

Burn Standard Co. Ltd. (No. 1)

RESPONDENT

Date of Decision : 11-01-2013

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A(1)
Finance Act, 2010 — Section 69, 69(2), 73, 73(2)

Citation : (2013) 294 ELT 389 : (2013) 19 GSTR 41

Hon'ble Judges : R. Karupiah, J; Chitra Venkataraman, J

Bench : Division Bench

Advocate : V. Sundareswaran, for Central Government, for the Appellant; L. Maithili for M/s. L. Maithili Associates, for the Respondent

Judgement

Chitra Venkataraman J.

1. The Revenue is on appeal and the appeal was admitted on the following substantial questions of law:

(i) When Notification No. 10/2008-CE (N.T.), dated March 1, 2008 brought the amendment to rule 6 of the Cenvat Credit Rules, 2004 with effect from April 1, 2008, can the hon"ble CESTAT, Chennai hold that the said amendment has the retrospective effect?

(ii) Whether the inference drawn by the hon"ble Tribunal that the respondent need not pay the amount at ten per cent. of the price at which the DBM was cleared during the months of January and February, 2008 on the ground that the respondent had not availed of Cenvat credit during the said months is correct as per law inasmuch as the respondent has in fact availed of Cenvat credit proportionate to the quantity of the DBM used in the further manufacture of dutiable goods based on the formula mentioned in paragraph 7 above which was not provided in the extract Cenvat Credit Rules, 2004?

(iii) When the amendment to rule 6 of the Cenvat Credit Rules, 2004 by the Finance Act, 2010 is optional to the respondent and the respondent has to opt to avail of the benefit provided in the amendment by filing an application with necessary certificate from a chartered accountant/cost accountant whether direction given by the hon"ble CESTAT, Chennai to the original adjudicating authority to verify the reversal of the credit for the month of March, 2008 in the light of the amendment to the Finance Act, 2010 is correct as per law? and

(iv) Whether the impugned Final Order No. 609/2010, dated June 7, 2010 of the hon"ble CESTAT, Chennai requires modification or not?

The period covered in this appeal at the instance of the Revenue is from January 1, 2008 to March, 2008. It is seen from the documents placed before this court that the assessee used a common input, namely, furnace oil in the manufacture of dutiable goods as well as non-dutiable goods, on which, Cenvat credit has been taken. In the context of rule 6 of the Cenvat Credit Rules, 2004, particularly sub-rule (2), requiring an assessee/manufacturer to maintain separate accounts in respect of exempted goods and dutiable goods for the purpose of working out Cenvat credit on the inputs used, a show-cause notice was issued, calling upon the respondent to indicate whether it had opted for maintaining separate accounts for exempted and dutiable final products, failing which, the manufacturer would have to pay ten per cent. of the total price of the exempted goods at the time of clearance from the factory.

2. The adjudicating authority pointed out that the assessee had not maintained separate accounts and hence, in these circumstances, proceedings were initiated to recover duty in terms of rule 14 of the Cenvat Credit Rules, 2004 read with section 11A(1) of the Central Excise Act, 1944.

3. The assessee pointed out through a statement that they had not taken any Cenvat credit in the months of January and February, 2008 on furnace oil used in respect of exempted goods. It also produced flow meter readings. Apart from that, it contended that it maintained separate accounts. The assessee further pointed out that up to the manufacture of the exempted goods, accounts for receipt, consumption and inventory of furnace oil are maintained. Nevertheless, it contended that for the month of March they had already reversed the duty amount on the inputs used in the manufacture of exempted items.

4. The adjudicating authority, however, rejected the plea that the assessee had not maintained the accounts in the manner required under sub-rule (2) of rule 6 of the Cenvat Credit Rules, 2004. In the absence of separate maintenance of accounts as per rule 6(2) of the Cenvat Credit Rules, 2004, in the case of dead burnt magnesite, which is an exempted product, the quantity of furnace oil was to be calculated using a formula. Based on that, the duty was charged on the respondent/assessee. Aggrieved by this, the assessee went on appeal before the Customs, Excise and Service Tax Appellate Tribunal. In paragraph 2 of the order of the Tribunal, it was pointed out that no Cenvat credit was taken on furnace oil

used for the manufacture of dead burnt magnesite during the months of January and February, 2008 and during the month of March, 2008, although the credit was taken, some proportionate credit was reversed on the basis of actual unit consumption of dead burnt magnesite. In the face of the reversal of the credit claimed by the assessee, the Tribunal held that the matter required investigation by the adjudicating authority and consequently set aside the order of the adjudicating authority and remanded the matter to the said authority for carrying out the verification as regards the reversal of the credit for the month of March, 2008, on the basis of the formula provided for under rule 6(3A) of the Cenvat Credit Rules, 2004. Aggrieved by this, the present appeal has been filed by the Revenue.

5. The learned standing counsel for the appellant submitted that as per the amended provision in section 73 by the Finance Act, 2010, an assessee, who opts for payment in accordance with the amended provision in subsection (1) of section 73 of the Finance Act, 2010, has to produce documentary evidence and necessary certificate from a chartered accountant/cost accountant, certifying the amount of input credit attributable to the inputs used in or in relation to the manufacture of final products, which are exempted from the duty, within a period of six months from the date on which the Finance Bill, 2010 receives the assent of the President. Thus, the six months' period expired on November 7, 2010. Hence, on the admitted fact that the respondent had not filed any such option with necessary documents within the said period, the claim could not be considered. He further contended that the findings of the Tribunal that the respondent had not taken any Cenvat credit for the period January and February, 2008 and for the month of March, 2008, the respondent reversed the proportionate credit, are perverse findings, not based on any material.

6. Countering the said claim, the learned counsel for the assessee pointed out through the reply to the notice issued by the adjudicating authority, which was extracted in the adjudication order, that the specific case of the assessee was that it did not claim any Cenvat credit on the inputs used in the manufacture of exempted goods for the months of January and February, 2008 and that for the month of March, 2008, it had reversed the entry. In the circumstances, in the absence of any material at the hands of the Revenue, the finding could not be called perverse. The only question that was considered by the adjudicating authority at the time of adjudication was as to whether the assessee had maintained the accounts in terms of rule 6(2) of the Cenvat Credit Rules, 2004. She further pointed out that the adjudication order was made much before the amendment to section 73 of the Finance Act, 2010 and even when the appeal was filed, there was no such amendment brought into section 73 of the Finance Act, 2010. The Tribunal passed the order on May 17, 2010.

7. In the circumstances, placing reliance on the decision of the Gujarat High Court, in the case of Shree Rama Multi Tech Ltd. Vs. Union of India (UOI), , the learned counsel submitted that the said contention of the Revenue that the

assessee had not complied with the condition stipulated in section 73(2) of the Finance Act, 2010, does not merit any acceptance. In any event, when the assessee had consistently taken the stand that it had not made any credit entry for the period January and February, 2008, the question of any reversal of entry does not arise and only for the month of March, 2008, where there was a reversal of entry, the claim has to be verified on the basis of the formula provided under rule 6(3A) of the Cenvat Credit Rules. Hence, no exception could be taken to the order of the Tribunal.

8. We agree with the contention of the learned counsel for the respondent-assessee. As seen from the adjudication order referring to the reply of the assessee, a specific stand was taken by the assessee that for the months of January and February, 2008, it had not made any credit entry on the furnace oil used in the manufacture of exempted goods and during the month of March, 2008, whatever credit was taken, the same was reversed by the assessee. In the course of appeal before the Tribunal, it is no doubt true that the Tribunal accepted the above said fact, particularly as regards January and February, 2008. Even though the learned counsel for the Revenue stated that such a finding is perverse, when read in the context of the reply filed by the assessee, on which there was no material from the Revenue side for rejection, we do not find any ground to uphold the contention of the Revenue as regards the non-utilisation of any Cenvat credit for the month of January and February, 2008. This leaves only one month, namely, March, 2008.

9. The contention of the assessee is that although the credit on furnace oil was originally taken, it, however, reversed it thereafter. In the background of the said claim, the Tribunal thought it fit to remand the matter back, directing the adjudicating authority to find out as to whether the formula provided for has been properly applied in this case. Ultimately if the assessee is to have the benefit of no liability, it has to follow the formula provided for under rule 6(3A) of the Cenvat Credit Rules.

10. Thus, the question that has to be considered is as to whether the reversal of the credit for the month of March, 2008 was taken on the basis of the formula provided for and in accordance with section 73(2) of the Finance Act, 2010. In the decision of Shree Rama Multi Tech Ltd. Vs. Union of India (UOI), , the Gujarat High Court considered a similar situation. There printing ink was used in the manufacture of dutiable plastic material and exempted labels and separate account under rule 57C of the Rules was not maintained. The Gujarat High Court observed as follows (page 35 of 19 GSTR):

Rule 57C of the Rules laid down that no credit of the specified duty paid on the inputs used in the manufacture of a final product shall be allowed if the final product is exempt from the whole of the duty of excise leviable thereon or is chargeable to nil rate of duty. Rule 57CC of the Rules as it stood at the relevant time made provision for "Adjustment of credit if final products are exempted". Under the said rule where a manufacturer was engaged in the manufacture of

any final product which was chargeable to duty as well as any other final product which was exempt from the whole of the duty of excise leviable thereon or was chargeable to nil rate of duty and the manufacturer took credit of the specified duty on any input (other than inputs used as fuel) which was used or ordinarily used in or in relation to the manufacture of both the aforesaid categories of final products, whether directly or indirectly and whether contained in the said final products or not, the manufacturer shall, unless the provisions of sub-rule (2) are complied with, pay an amount equal to eight per cent. of the price (excluding sales tax and other taxes, if any, payable on such goods) of the second category of final products charged by the manufacturer for the sale of goods at the time of clearance from their factory by adjustment in the credit account maintained under sub-rule (3) of rule 57G or in the accounts maintained under rule 9 of sub-rule (1) of rule 173G or if such adjustment is not possible for any reason, by cash recovery from the manufacturer availing of the credit under rule 57A. Sub-rule (2) thereof provided that in respect of inputs (other than inputs used as fuel) which are used in or in relation to the manufacture of any goods, which are exempt from the whole of the duty of excise leviable thereon or chargeable to nil rate of duty, the manufacturer shall maintain separate inventory and accounts of the receipt and use the inputs for the aforesaid purpose and does not take credit of the specified duty on such inputs.

11. Section 69(2) of the Finance Act, 2010 brought in rule 57CCC, which provided for making such reversal of the entry for the period from September, 1996 to February 28, 1997, a manufacturer availing of credit in respect of any input other than input used as fuel and manufacturing final products chargeable to duty and products not chargeable to duty or chargeable to interest rate, shall pay an amount equivalent to such credit attributable to inputs used in, or in relation to the manufacture of, final products chargeable to nil rate, or no rate, before the clearance of goods. Such assessee would have to make an application for the same within six months of the enactment of the bill along with documentary evidence and a certificate from a chartered accountant or a cost accountant certifying the amount of input credit attributable to the inputs used in or in relation to the manufacture of final products which are exempted from the whole of the duty or chargeable to nil rate of duty, within a period of six months from the date on which the Finance Bill, 2010 receives the assent of the President. The Finance Bill, 2010 has received the assent of the President in May, 2010. Admittedly, the assessee did not make the application on account of the pending proceedings before the court. Thus, considering the said fact, the High Court pointed out to the contention of the assessee that they were not required to make any such application on account of the reversal of the credit already taken and held that considering the amended rule as to the availability of the benefit as contemplated u/s 69 of the Finance Act taking care of such situation and the fact that the amendment came during the pendency of the appeal, the proper course was to remand the matter back to the adjudicating authority to re-determine the credit taken on the common input in so far as it related to dutiable

goods and exempted goods and the goods chargeable to nil rate. The High Court directed the assessee to produce necessary evidence in the form of a certificate from a chartered accountant or a cost accountant for the relevant period on the amount of input credit attributable to the inputs used in or in relation to the manufacture of final product, which are exempt from the duty, along with the other documentary evidence for the relevant period.

12. We respectfully agree with the decision of the Gujarat High Court reported in *Shree Rama Multi Tech Ltd. Vs. Union of India (UOI)*,). Thus, on the line of reasoning of the Gujarat High Court, we hold that as on the date of the adjudication order and on the date of filing the appeal too, section 73(2) itself was not available and that it was amended under the Finance Act, 2010 only during the pendency of the appeal. Thus, with the bona fide prosecution of the appeal, we do not find any justifiable ground to accept the stand taken by the Revenue that in the absence of compliance of the conditions in section 73(2) of the Finance Act, 2010 within the six months" period, the claim of the assessee has to fail. The question of such a compliance as on the date of adjudication or filing of the appeal not being there, when the Tribunal felt, on facts, that it was necessary to remand the matter back to the adjudicating authority. Thus, we have no hesitation in confirming the order of remand restoring the matter back to the adjudicating authority to consider the claim of the assessee. We direct the assessee to produce necessary" evidence in the form of certificate from a chartered accountant or a cost accountant for the relevant period, certifying the amount of input credit attributable to the inputs used in or in relation to the manufacture of final product, which are exempt from the duty, along with documents on the reversal of entry made before the adjudicating authority. Accordingly, the civil miscellaneous appeal is dismissed. No costs. Consequently, the above MP is also dismissed.