
(2013) 01 MAD CK 0269

In the Madras High Court

Case No : Civil Miscellaneous Appeal No. 3289 of 2012 and M.P. No. 1 of 2012

Commissioner of Central Excise

APPELLANT

Vs

Burn Standard Co. Ltd. (No. 2)

RESPONDENT

Date of Decision : 11-01-2013

Acts Referred:

Finance Act, 2010 — Section 73, 73(2)

Citation : (2013) 295 ELT 671 : (2013) 19 GSTR 49

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

Bench : Division Bench

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

Judgement

Chitra Venkataraman, J.—The Revenue is on appeal as against the order of the Customs, Excise and Service Tax Appellate Tribunal by raising the following questions of law:

(i) Whether the Appellate Tribunal was correct in applying the Amendment to rule 6 of the Cenvat Credit Rules, 2004, vide the Finance Act, 2010 which is applicable for the period from September 10, 2004 to March 31, 2008 whereas the period in dispute being April, 2008 to December, 2008?

(ii) Whether the Appellate Tribunal was correct in accepting the oral plea of the assessee, without any documentary evidence supported by a certificate from the chartered accountant or cost accountant, which had to be filed within six months from the date of the assent of the President, as per section 73(2) of the Finance Act, 2010, when factually the assessee had failed to comply with the condition requisite under the Finance Act, 2010?

(iii) Whether the Appellate Tribunal was justified in setting aside the order of the adjudicating authority by totally ignoring the law that the assessee having failed to opt for the procedure under the substituted rule 6(3A) of the Cenvat Credit Rules, 2004 with effect from April 1, 2008 (instead debited/reversed the duty

amount based on their own theoretical basis calculation) is not entitled for any relief under the Act?

(iv) Whether the Appellate Tribunal having after factually concluded that the assessee had failed to maintain separate accounts in respect of goods used in the manufacture of exempted and dutiable goods was justified in setting aside the order-in-original and allowing the appeal?

(v) Whether the Appellate Tribunal misdirected itself and thereby fell into an error in setting aside the levy of duty for the period from April, 2008 to December, 2008 (Rs. 1,63,40,443) being ten per cent. of the total price of exempted excisable goods cleared with consequential interest and penalty thereof?

(vi) Whether the Appellate Tribunal committed an apparent error of jurisdiction in not appreciating the facts of the case and provision of law in setting aside Order-in-Original No. 1 of 2010, dated January 29, 2010 and remanding the case, back to the adjudicating authority for adjudication afresh?

The period covered in the appeal before this court is between April, 2008 and December, 2008. Rule 6 of the Cenvat Credit Rules prescribes the procedure as regards availing of Cenvat credit, particularly in cases where, a part of the manufactured items are exempted and a part of the manufactured items are subject to levy of duty. Rule 6 of the Cenvat Credit Rules states that Cenvat credit shall not be allowed in respect of input used in or in relation to the manufacture of exempted goods or for provision of exempted services. Therefore, the credit is availed of only in respect of manufactured goods which are subjected to duty. In a given situation where the manufacturer produces goods that attract levy as well as goods which are exempted, the manufacturer or provider of output service must maintain separate accounts. Rule 6(2) of the Cenvat credit Rules reads as follows:

6. (2) Where a manufacturer or provider of output service avails of Cenvat credit in respect of any inputs or input services and manufactures such final products or provides such output service which are chargeable to duty or tax as well as exempted goods or services, then, the manufacturer or provider of output service shall maintain separate accounts for--

(a) the receipt, consumption and inventory of inputs used--

(i) in or in relation to the manufacture of exempted goods;

(ii) in or in relation to the manufacture of dutiable final products excluding exempted goods;

(iii) for the provision of exempted services;

(iv) for the provision of output services excluding exempted services; and

(b) the receipt and use of input services--

- (i) in or relation to the manufacture of exempted goods and their clearance up to the place of removal;
- (ii) in or in relation to the manufacture of dutiable final products, excluding exempted goods, and their clearance up to the place of removal;
- (iii) for the provision of exempted services; and
- (iv) for the provision of output services excluding exempted services, and shall take Cenvat credit only on inputs under sub-clauses (ii) and (iv) of clause (a) and input services under sub-clauses (ii) and (iv) of clause (b).

2. Sub-rule (3) of rule 6 of the Cenvat Credit Rules provides for the situation wherein the manufactured goods or the provider of output service does not maintain separate accounts. Even in such cases, the rule provides for payment of duty at a particular percentage and the method of arriving at the amount payable under clause (ii) of sub-rule (3) of rule 6. Sub-rule (3A) of rule 6 reads as follows:

(3A) For determination and payment of amount payable under clause (ii) of sub-rule (3), the manufacturer of goods or the provider of output service shall follow the following procedure and conditions namely:--

(a) While exercising this option, the manufacturer of goods or the provider of output service shall intimate in writing to the Superintendent of Central Excise giving the following particulars, namely:--

(i) name, address and registration No. of the manufacturer of goods or provider of output service;

(ii) date from which the option under this clause is exercised or proposed to be exercised;

(iii) description of dutiable goods or taxable services;

(iv) description of exempted goods or exempted services;

(v) Cenvat credit of inputs and input services lying in balance as on the date of exercising the option under this condition;

3. The assessee herein is a manufacturer of ramming mass and refractory bricks (fixed and unfixed) falling under Tariff Sub-heading 381600, 680790 and 690190 of the Central Excise Tariff Act, 1985. It also manufactures exempted goods, namely, dead burnt magnesite falling under Tariff Subheading 250500 of the Central Excise Tariff Act, 1985. According to the Revenue, the assessee had taken Cenvat credit on common input, namely, furnace oil, under rule 3 of the Cenvat Credit Rules, 2004, for which they had not maintained any separate records for the receipt, consumption and inventory of inputs meant for use in the manufacture of both dutiable and exempted final products. The assessee had cleared the exempted goods without payment of amount equal to the extent of the total price of dead burnt magnesite, as required under rule 6(3)(b) during

April, 2008 to December, 2008.

4. As far as the present case is concerned, admittedly, the respondent herein manufactured items which are dutiable as well as exempted. Hence, rule 6 of the Cenvat Credit Rules is relevant to the case on hand.

5. Thus a notice was issued by the adjudicating authority as to the entitlement of the assessee to the applicability of sub-rule (3A) of rule 6 of the Cenvat Credit Rules. The assessee stated that it had maintained separate accounts of inputs; they issued furnace oil from the storage tank through pipe lines fitted with flow meters separately for the manufacture of DBM and calcined magnesite and refractory bricks and ramming mass and therefore, the exact quantity of furnace oil used in the manufacture of DBM and calcined magnesite were known as per the records maintained therein; they started maintaining separate records for the receipts, consumption and inventory for the consumption of furnace oil used for the manufacture of both the dutiable final products and non-dutiable intermediate products and hence, there was no contravention of the Rules.

6. On a specific question as to whether the accounts were maintained as required under rule 6(2) of the Cenvat Credit Rules, the adjudicating officer pointed out that on verification of records, it was found that the respondent had maintained details up to the manufacture of dead burnt magnesite, accounts for receipt, consumption and inventory of furnace oil was maintained commonly. The process flow chart of each of the manufactured goods, furnace oil pipe line layout diagram, extract of flow meter readings and furnace oil utilisation register in respect of dead burnt magnesite, thus revealed that the pattern of accounting of furnace oil was not in accordance with the rules to show the receipt, consumption and inventory of furnace oil used for the manufacture of exempted goods and for the manufacture of dutiable ramming mass and refractory bricks. Thus, the adjudicating authority came to the conclusion that the accounts were not in conformity with the requirement of rule 6(2) of the Cenvat Credit Rules. The adjudicating authority further pointed out that there was nothing on record to show that the assessee had followed the qualifying procedure and conditions specified under sub-rule (3A) for payment of amount under clause (ii) of sub-rule (3) of rule 6 during the material period. In the light of the finding thus arrived at, in paragraph 8.01, the adjudicating authority came to the conclusion that in respect of DBM which was sold outside without payment of duty, in the absence of separate account of furnace oil used, the demand for an amount equal to ten per cent. of the price of that quantity of dead burnt magnesite, which was cleared outside, was maintainable in law. Thus, apart from duty, interest under rule 14 of the Rules read with section 11AB of the Act and penalty under rule 15 of the Rules were also levied. Aggrieved by this, the assessee went on appeal before the Customs, Excise and Service Tax Appellate Tribunal;

7. The Tribunal set aside the order and allowed the appeal by remanding the matter back to the adjudicating authority for deciding the matter afresh, in the light of the retrospective amendment to the Rules along with an application filed

by the assessee u/s 73 of the Finance Act, 2010. Referring to the retrospective amendment in Cenvat credit rule 6, done by section 73 of the Finance Act, 2010, the Tribunal pointed out that the assessee had submitted necessary application as per section 73 of the Finance Act, 2010 and such application was pending for decision. The Revenue submitted that if proper reversal of credit attributable to the inputs used in the manufacture of exempted products was done, there was no scope for further demand. Hence, the question whether credit had been properly reversed, required to be examined. Thus, setting aside the order of the adjudicating authority, the Tribunal remitted the matter back to the adjudicating authority for deciding the matter afresh in the light of the amendment to the Rules along with the application filed by the assessee u/s 73 of the Finance Act, 2010. Aggrieved by this, the present appeal has been filed by the Revenue.

8. The learned standing counsel appearing for the Revenue submitted that as far as the present case is concerned, the claim of the assessee is not sustainable and the same has to be decided as per the then existing rule and the amended provision of section 73 of the Finance Act, 2010 will not be applicable to the case on hand. In any event, when the respondent had not complied with the Explanation to sub-rule (3A) of rule 6 of the Cenvat Credit Rules, the question of remand in this case does not arise. He submitted that even going by the assessee's reply, there was no separate account maintained, to show that the receipt, consumption and inventory of furnace oil are used for the manufacture of dead burnt magnesite, which is exempted under the provisions of the Act. When the accounts are not maintained in conformity with the requirements of rule 6(2), the assessee was not entitled to any further enquiry or relief. He pointed out that as per section 73 of the Finance Act, 2010, new sub-rule (7) in rule 6 was given retrospective effect from September 10, 2004 to March 31, 2008 only. The period covered herein is April, 2008 to December, 2008 and the petitioner has not submitted any application within the time.

9. The learned counsel appearing for the assessee, however, pointed out that the amendment merely gave effect to the various judicial pronouncements to the effect that rule 57C of the Central Excise Rules specifically barred the availment of credit on inputs used in the manufacture of exempted final products. If the manufacturer uses common inputs in the manufacture of dutiable and non-dutiable goods, the manufacturer had to reverse the credit to the extent of inputs used in the manufacture of exempted goods.

10. Rule 57CC obviates the difficulty arising in cases where there was no separate account or where it was not possible to maintain separate accounts. Wherever the reversal of credit was not possible, presumptive duty was payable as per rule 57CC. The Cenvat Credit Rules, 2002, accordingly, contained these provisions in rule 6(2) and 6(3). Rule 6(3A) provided for a formula wherever the assessee could not maintain separate account. Referring to the decision of the apex court reported in (Chandrapur Magnet Wires (P) Ltd., Nagpur Vs. Collector of Central Excise, Central Excise Collectorate, Nagpur,), holding that a

manufacturer could take credit on duty paid on all inputs used in the manufacture of goods suffering duty and the assessee could make a debit entry in the credit account before removal of the exempted final products, she pointed out that part of dead burnt magnesite is also consumed in the manufacture of refractory bricks--dutyable final products. Hence, by arithmetical calculation, the exact quantum of furnace oil consumed with respect to dead burnt magnesite cleared outside the factory, could be calculated and based on this, proportionate credit was reversed by the assessee. Consequently, the question of applying rule 6(2)/6(3) demanding ten per cent. of the price of dead burnt magnesite did not arise. All that the Tribunal has done herein is to direct verification as to whether the calculation adopted by the assessee was correct or not. She pointed out that the amendment to the rule itself came only during the pendency of the appeal. As such, the time-limit spoken to, will not apply to the assessee's case. In any event, the assessee had already reversed the proportionate credit and all that is required herein is the verification on the calculation done by the assessee. The amendment containing the option for the period September 10, 2004 to March 31, 2008 by making the claim within the time frame, was made only to extend the benefits to such of those assessees who had not claimed.

11. Heard learned counsel appearing for the Revenue and the learned counsel appearing for the assessee.

12. A reading of the amendment made to rule 6 u/s 73 of the Finance Act, 2010, shows that the amendment procedure of the Cenvat credit under rule 6 was to have retrospective effect from September, 2004. The said amendment is provided for by insertion under rule 6(6). The said amendment reads as under (See [2011] 7 GSTR (St.) 327):

Thus, the said rule covers the case of the assessees in whose cases there existed a dispute relating to adjustment of credit on inputs or input services used in or in relation to exempted final products and the period of dispute related to the period beginning from September 10, 2004 to March 31, 2008. In such cases, as per section 73(2) of the Finance Act, 2010, the assessee has to make an application to the Commissioner of Central Excise along with documentary evidence and a certificate from the 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 exempted goods within a period of six months from the date on which the Finance Bill, 2010 received the assent of the President. Thus, the Finance Act, effective from May 8, 2010 to November 7, 2010--the six months period, expired on November 7, 2010. The period covered in this appeal is from April, 2008 to December, 2008.

13. Admittedly, the Revenue did not raise any question as regards the noncompliance of sub-rule (3A) of rule 6 of the Cenvat Credit Rules before the Tribunal. The submission of the Revenue before the Tribunal was that if proper reversal of credit attributable to the inputs used in the manufacture of exempted products was done, there was no scope for further demand. The learned counsel

for the Revenue pointed out that the adjudicating officer categorically pointed out in paragraph 7.11, that there was nothing on record to show that the qualifying procedure and conditions specified under sub-rule (3A) for payment of amount under clause (ii) of sub-rule (3) of rule 6 had been followed by the assessee during the material period. He further pointed out that as per the Explanation to sub-rule (3A) to rule 6, the manufacturer should have availed of any of the options, failing which, the question of considering the claim even as per sub-rule (3A) of rule 6 does not arise. We do not find any justification in accepting the plea of the Revenue. Considering the submission made by the Department's representative before the Tribunal in the absence of a question raised before the Tribunal as regards the non-compliance of the option granted under the Explanation and the only question that was raised before the Tribunal being on the entitlement of the assessee on the reversal of credit attributable to the inputs used in the manufacture of exempted products, we do not find any justification to grant the relief sought for in the appeal. For the purpose of this case, it is not necessary at all for us to consider section 73(2) of the Finance Act, 2010 at all. Consequently, the order of the Tribunal is confirmed. The adjudicating authority shall consider the contentions of the assessee u/s 73 of the Finance Act, 2010 and as per rule 6 of the Cenvat Credit Rules. The above civil miscellaneous appeal is dismissed. No costs. Consequently, the connected MP is closed.