
(2013) 03 MAD CK 0196

In the Madras High Court

Case No : C.M.A. No. 2944 of 2005 and C.M.P. No. 15346 of 2005

Commissioner of Central Excise

APPELLANT

Vs

Customs and M/s. PSG Industrial Institute

RESPONDENT

Date of Decision : 06-03-2013

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35E(2), 4

Citation : (2013) 294 ELT 372 : (2013) 20 GSTR 74

Hon'ble Judges : R. Banumathi, J;K. Ravichandrabaabu, J

Bench : Division Bench

Advocate : E. Vijay Anand, SCGSC, for the Appellant; Muthu Venktaraman, (R1), for the Respondent

Judgement

K. Ravichandrabaabu, J.—The Revenue is on appeal as against the order passed by the CESTAT by raising the following substantial questions of law:-

1. Whether the Tribunal is correct in holding that the final product is castings and not PD pumps when castings are only captively consumed and not sold from the factory in order to bring within the purview of then word "price" used under Rule 57CC of the erstwhile Central Excise Rules, 1944 ?
2. Whether the Tribunal is correct in holding that the payment of duty at the rate of 8% under Rule 57CC of the erstwhile Central Excise Rules, 1944 can be on the castings captively consumed when the word "Price" used under Rule 57 CC has to be applied only in relation to sale and clearance of final products, i.e. P.D. pumps, which are exempted from payment of duty, thus over riding the legal provisions ?

It is the case of the Revenue that the assessee is engaged in the manufacture of dutiable products like CNC lathes, Lathe machines, Drilling Machines, Power Driven Pumps, CI Castings, Electric Motors etc., and exempted products like Centrifugal Water Pumps, Mono Bloc Pumps and Submersible Pumps. They filed declarations under Rule 57G of the Central Excise Rule 1944 for the purpose of

availing Modvat Credit on various inputs. But they have not declared centrifugal pumps, Mono bloc Pumps and Submersible Pumps as final products. The assessee used various foundry chemicals and rejected CI castings, machining wastes etc., as inputs in the manufacture of CI castings which in turn were used in the manufacture of exempted final products viz., Centrifugal Pumps, Monobloc pumps and Submersible Pumps and some varieties of CI Castings. The assessee also cleared CI castings as such outside the factory on payment of duty and some quantity of CI castings were used in the manufacture of exempted final products. As per Rule 57CC (9) of the Central Excise Rules, 1944, the assessee has to maintain separate accounts of receipt and consumption of inputs meant for use in the manufacture of dutiable final products and the quantity of inputs meant for use in the manufacture of exempted final products. The assessee has to take credit only on such quantity of inputs which was intended for use in the manufacture of dutiable final products. The assessee did not maintain separate accounts as contemplated under Rule 57CC (9). Under the said Rule, if no such separate account is maintained by the assessee, then the assessee has to pay an amount equal to 8% on the sale price of the exempted final products as duty at the time of clearance. Therefore, a show cause notice was issued to the assessee on 2.2.1998 by specifically contending that the assessee was not maintaining separate inventory and accounts as required under Rule 57CC (9). A reply was filed by the assessee.

2. The adjudicating authority dropped further proceedings initiated on the ground that the duty reversal was correctly done by the assessee on the value of the CI castings. The said order of the original authority was found to be incorrect by the Commissioner of Central Excise, Coimbatore and consequently by invoking the power u/s 35E(2) of the Central Excise Act 1944, he directed for filing an appeal against the said order. Accordingly, the Revenue filed an appeal before the first appellate authority. The first appellate authority, after considering the rival contentions, found that the assessee failed to discharge the liability in the manner in which it is contemplated under sub-rule (1) of Rule 57CC. The first appellate authority also found that the assessee did not maintain separate account of inputs. He further pointed out that the input credit was denied not because of their use in the captively consumed and exempted CI castings but because of their use in the various exempted pumps. He also found that what was sold for a price on clearance from the factory is the P.D. Pumps and as such an amount equal to 8% of the price of the exempted P.D. Pumps has to be paid by the assessee under the said rule. Aggrieved by the order of the first appellate authority, the assessee filed an appeal before the CESTAT. The Tribunal, by following an order of the Co-ordinate Bench of the Mumbai Tribunal in the case of 2004 (113) ECR 696) allowed, the appeal by holding that the final product emerged out of the factory is CI castings and not PD Pumps manufactured by using the castings. Accordingly, the Tribunal came to the conclusion that the demand is not sustainable. Therefore, the present appeal is filed by the Revenue by raising the above substantial questions of law.

3. Learned counsel appearing for the Revenue submitted that the assessee manufactures both dutiable and non-dutiable final products viz., CI castings and submersible pumps, respectively. However, for manufacturing submersible pumps, the assessee captively consumed CI castings. When the assessee had used inputs both in the manufacture of dutiable final products as well as in the manufacture of exempted final products, they should maintain separate accounts showing the details of inputs received and consumed both in respect of manufacture of dutiable final products as well as exempted goods.

If no such separate accounts are maintained as required under Rule 57CC (9), the assessee is bound to pay 8% of duty on the sale price of the exempted goods at the time of clearance.

4. He further contended that the finding of the Tribunal that the final product emerged from the assessee was only CI castings is factually incorrect and on the other hand the first appellate authority has rightly found based on the facts and materials placed before him that the assessee had cleared the CI castings as such apart from using the same in the manufacture of final products viz., monobloc pumps etc, which are exempted one. He relied on a decision of the Apex Court reported in Commissioner of Central Excise, Nagpur Vs. Ballarpur Industries Ltd., in support of his contentions.

5. Per contra, the learned counsel appearing for the assessee submitted that the Tribunal rightly found that the assessee cleared CI castings as final products and not the PD pumps and therefore, the demand of duty at the rate of 8% on the sale price of the exempted final product viz. pumps cannot be demanded. In support of his submission, he relied on a larger Bench decision of Delhi Tribunal in the case of 2006 (136) ECR 557 .

6. Heard the learned counsels appearing for either side.

7. The point for consideration in this appeal is as to whether the assessee is liable to pay 8% on the price of the exempted final products viz., PD Pumps cleared from factory or 8% on the price of CI casting which was captively consumed by the assessee for the manufacture of those exempted goods viz., PD pumps.

8. It is an admitted case of the assessee that they are manufacturers of CI castings along with machineries, electric motors, centrifugal pumps etc., and were availing MODVAT credit on various inputs used in the manufacture of the above goods except the exempted goods. Rule 57CC (9) of the Central Excise Rules 1944, contemplates that the manufacturer shall maintain separate inventory and accounts of the receipt and use of inputs 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. If the assessee receives inputs in its factory which are meant for use in the manufacture of both dutiable products as well as exempted one, it should maintain a separate inventory and accounts in respect of the receipt and use of inputs which are used in or in relation to any goods

exempted from the levy of duty. However, an option is given to the assessee to pay 8% ad valorem on the value of the price of such final products, if he fails to maintain a separate account. In this case, the original authority dropped further proceedings by holding that CI castings themselves are the final products as they were sold as such as well as captively consumed for the manufacture of PD pumps. Therefore, he found that that PD pumps are not final products. He further observed that when CI castings were cleared on payment of duty as such and the second category of the final products were used captively for the manufacture of PD pumps, the question of payment of an amount equivalent to 8% on the exempted PD pumps value does not arise.

9. On the other hand the first appellate authority found that the assessee was manufacturing both CI castings as well as monobloc pumps etc, while the former is a dutiable one and the latter is an exempted one. He also specifically found that the assessee used various inputs for the manufacture of their dutiable and non-dutiable final products. Insofar as the non-dutiable final products, viz., the pumps are concerned, the first appellate authority has found that the assessee had not followed Rule 57CC(9) as they have not admittedly maintained separate accounts in respect of the inputs received and used for the manufacture of exempted final products. The assessee has to necessarily maintain separate accounts as contemplated under Rule 57CC (9) and in the absence of maintaining such accounts, they have to pay 8% of duty on the sale price of exempted final products cleared by them.

10. Here in this case, admittedly, the exempted final products is the monobloc etc., and not CI castings. In order to escape from the liability, the assessee projected its case as though the final product cleared was only CI castings and not the monobloc pumps. Such contention was rejected by the first appellate authority by specifically going into all the facts and materials placed before him. Such factual finding rendered by the first appellate authority was rejected by the Tribunal by holding that what was cleared is only CI castings and not PD pumps. A perusal of the order passed by the Tribunal would only show that the factual aspect of the matter was not gone into in detail. The Tribunal being the final fact finding authority, ought to have considered the entire facts and materials and the findings of the first appellate authority. There is absolutely no reason given by the Tribunal as to how it has come to the conclusion that the final product which is manufactured is only CI castings and not PD pumps, whereas the first appellate authority had given detailed reasonings for arriving at such conclusion based on the materials placed before it. We are in total agreement with the order passed by the first appellate authority supported by well considered reasonings.

11. At this juncture, it is useful to refer to the decision of the Hon"ble Supreme Court reported in Commissioner of Central Excise, Nagpur Vs. Ballarpur Industries Ltd., The Apex Court has considered a similar issue and held that 8% duty is liable to be paid by the assessee who had not complied with Rule 57CC (9) on the value of the exempted goods at the time of clearance from the factory

gate. The relevant paragraphs of the said decision are usefully extracted hereunder:

16. The object of Rule 57-CC(1) was to recover a presumptive sum upon removal of exempted goods from a manufacturer who also manufactured dutiable goods, but using common input for both dutiable as well as duty exempted goods and who took MODVAT credit on such common inputs. Rule 57-CC sought, therefore, to recover a presumptive sum equal to eight per cent of the price of exempted goods at the time of their removal where the manufacturer did not undertake maintenance of inventory/accounts of the clearance of exempted final products. Even sub-rule (7) of Rule 57-CC was based on deemed price if read with Rule 57-CC(1). Sub-rule (7) read with sub-rule (1) prevented an assessee from contending that he was not liable to pay the presumptive sum of eight per cent of the price of exempted goods on the ground that the said exempted goods were wholly manufactured out of inputs on which no credit of duty had been taken under Rule 57-A. The amount required to be paid at the time of removal of exempted goods under Rule 57-CC(1) had to be done in the same manner as was the case with any other excisable goods as the rate of duty stood determined at the rate of eight per cent in the Rule itself. The said presumptive amount was required to be paid by debiting in PLA register or by payment in cash.

17. As stated above, there was an alternative provided under sub-rule (9) which relieved the manufacturer of the liability to pay eight per cent of the price of exempted goods at the time of removal of such goods. Under sub-rule (9), the assessee was required to maintain a separate account and an inventory and that he was not entitled to take credit on the inputs meant for use in exempted final product. If such accounts and inventory were maintained, there was no need to pay a presumptive amount equal to eight per cent of the price of exempted goods at the time of their removal.

18. In our view, Rule 57-CC, therefore, required payment of a presumptive amount of eight per cent of the price of the exempted goods, net of sales tax and other taxes. This Rule was self-contained provision indicating the basis on which price had to be determined. The Rule, however, has not called the said amount of eight per cent as duty of excise. As indicated in the above circular, quoted above, the manufacturer who did not maintain account or inventory was required to debit the amount equal to 8 per cent of the value of exempted goods at the time of removal of goods from the factory. In our view, the said amount of 8 per cent of the value of the goods at the time of clearance is the measure and it brings in also the applicability of Section 4 of the 1944 Act and the Valuation Rules, 1975 framed thereunder.

Thus from the reading of the above decision of the Apex Court, we find no difficulty in applying the same to the present case and to reject the case of the assessee.

12. The learned counsel for the assessee relied on a larger Bench decision of the Tribunal in the case of 2006 (136) ECR 557. When the decision of Hon''ble Supreme Court cited supra is very much on the point and in support of our conclusion, the Tribunal decision relied on by the assessee may not have any persuasive value.

13. After we reserved judgment in this appeal, the learned counsel for the assessee filed a written submission along with further case laws. The sum and substance of the written submission filed by the assessee projected his case as though the CI castings alone is the final product and when 8% of the CI castings have been discharged, which were captively consumed in the manufacture of PD pumps, the question of payment of the amount equivalent to 8% on the exempted PD pumps does not arise. We have already noted that the first appellate authority has given a factual finding that the final product is not the CI castings alone and on the other hand, it is also the monobloc pumps which are exempted from payment of duty. It is also the finding of the first appellate authority that the assessee used various common inputs in both dutiable and exempted final products. Therefore, when further finding of not maintaining separate account is not disputed by the assessee, automatically, Rule 57CC(9) comes into operation.

14. No doubt, the learned counsel for the assessee by placing the order in original made in the case of *Texmo Industries Vs. Commissioner of Central Excise, Coimbatore* case contented that even in that case they have not maintained separate accounts and therefore, the decision of the larger bench of Delhi Tribunal reported in 2006 (136) ECR 557 has to be applied in this case. He also relied on the decision reported in *Chandrapur Magnet Wires (P) Ltd., Nagpur Vs. Collector of Central Excise, Central Excise Collectorate, Nagpur*. A perusal of the facts of that case shows that it was in respect of an exemption notification and the application of Rule 57A of the Central Excise Rules. We are unable to find any similarity on the facts of that case with the present one. Likewise, the other decisions relied on by the learned counsel for the assessee reported in *Commissioner of C. Ex., Bangalore-III Vs. Himalaya Drug Co. Ltd.*, and 2011 (263) ELT 661 (Guj.) (*Commissioner of Central Excise Vs. Mann Pharmaceuticals Ltd.*), are by other High Courts. A perusal of those decisions show that they are distinguishable on facts and the decision of the Apex Court in the case of *Ballarpur Industries Ltd.*, was not placed before the Court. At any event, we have relied on the subsequent decision of the Apex Court reported in *Commissioner of Central Excise, Nagpur Vs. Ballarpur Industries Ltd.*, which decision, in our considered view, is on the point. The reliance placed on the decision reported in *Chandrapur Magnet Wires (P) Ltd., Nagpur Vs. Collector of Central Excise, Central Excise Collectorate, Nagpur*, is of no assistance to the assessee. Based on the above facts and circumstances of the case as well as by following the decision of the Apex Court reported in *Commissioner of Central Excise, Nagpur Vs. Ballarpur Industries Ltd.*, we allow the appeal filed by the Revenue by answering the questions of law in favour of the Revenue and against

the assessee. Consequently the connected C.M.P. is closed. No costs.