(2012) 08 GUJ CK 0054

In the Gujarat High Court

Case No : Tax Appeal No. 536 of 2007

Commissioner of Central Excise — APPELLANT

Vs

Indian Oil Corporation Ltd. — RESPONDENT

Date of Decision : 16-08-2012

Acts Referred:
CENVAT (Credit) Rules, 2002 — Rule 4(2), 4(2)(b), 4(2)(b)

Citation : (2013) 20 GSTR 369

Hon'ble Judges : Harsha Devani, J;Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Naynaben K. Gadhvi, for the Appellant;

Final Decision : Dismissed

Judgement

Akil Kureshi, J.

The judgment of the court was delivered by

1. The Revenue is in appeal against the judgment of the Customs, Excise and Service Tax Appellate Tribunal ("Tribunal" for short) dated November 14, 2006. At the time of admission of the appeal, the following substantial question of law was framed:

Whether the Tribunal is justified in holding that the words ''in use of in rule 4(2) of the Cenvat Credit Rules, 2002 have to be treated as meaning is available for use of the manufacturer and whether the Tribunal ought to have held that for the purpose of taking balance amount of Cenvat credit under rule 4(2)(b) of the Cenvat Credit Rules, 2002 in the financial year subsequent to the year in which capital goods are received, such goods should not only be in possession but should also be in actual use ?

The issue arises in the following factual background. The respondent, Indian Oil Corporation, a public sector undertaking had purchased certain machinery for setting up a laboratory for its use. As per the Cenvat Credit Rules, 2002, ("the

Rules" for short), the respondent availed of 50 per cent of the Cenvat credit on purchase of such inputs in the said year itself. In the following year on April 1, 2004, the respondent availed of the remaining 50 per cent, of the Cenvat credit to the tune of Rs. 58,86,709. The Department, however, was of the opinion that the respondent had not yet put such machinery to use on April 1, 2004 when such Cenvat credit was taken. A show-cause notice dated April 28, 2005, therefore, came to be issued in which it was stated, inter alia, that to avail of the remaining 50 per cent. Cenvat credit, the assessee ought to have put the machinery to use. The laboratory itself as per the engineer''s certificate was set up on August 13, 2004. The credit, therefore, could not have been taken on April 1, 2004. Reference was made to rule 4(2) of the Rules in this respect. The respondent was, therefore, called upon to state why Cenvat credit wrongly taken be not reversed and interest and penalty be not charged.

2. The respondent opposed the proceedings contending that previously the rule provided availment of 100 per cent, credit only after installation of the machinery. Under the amended rule 4(2) of the Rules, relaxation was given to avail of 50 per cent, of the credit during the year of purchase and the balance 50 per cent, in the subsequent year subject to the condition of possession and use. The respondent emphasized on the words "possession and use" employed in rule 4(2) of the Rules. It was contended that Indian Oil Corporation continued to be in the possession of the machinery and in fact the same was also put to use for construction of laboratory itself. It was pointed out that to remove any such possible misinterpretation by the Government, the Cenvat Credit Rules, 2004 introduced with effect from September 10, 2004 removed the word "use" from rule 4(2) of the Rules.

3. The adjudicating officer, however, was not convinced. He was of the opinion that in terms of rule 4(2) of the Rules, the respondent was entitled to avail of 50 per cent, credit during the year of acquisition of the machinery whereas the remaining 50 per cent, could be availed of only upon its use in manufacture of the final product. In the present case, since the laboratory was constructed only on August 13, 2004, availment of Cenvat credit with effect from April 1, 2004 was not permissible. He, therefore, directed reversal of Cenvat credit, which according to him was wrongly taken. He, however, permitted the respondent to avail of such credit as on August 13, 2004. He charged interest u/s 11AB of the Act for the period from April 1, 2004 to August 13, 2004 and imposed penalty of Rs. 5,000 under rule 13(1) of the Rules. Against such order, the respondent approached the Tribunal. The Tribunal by the impugned judgment, as noted above, allowed the appeal. The Tribunal relied on its earlier decision in the case of 2006 (136) ECR 54 and held that the word "use" has to be treated as meaning as available for use of the manufacturer.

4. Before us, the counsel for the Department submitted that rule 4(2) of the Rules was sufficiently clear. The assessee without putting the machinery to use for the manufacture of the final product could not avail of the remaining 50 per

cent, of the credit. In the present case, construction of the laboratory was not completed before August 13, 2004. The counsel drew our attention to the decision of the Mumbai Bench of the Tribunal in the case of 2006 (136) ECR 54 to contend that the issue involved in the said decision arose in a different factual background.

5. From the above discussion, it can be seen that the short question which calls for consideration, in the facts of the present case, is whether the respondent was entitled to avail of Cenvat credit of the remaining 50 per cent, on April 1, 2004 on purchase of capital goods. Rule 4 of the Rules pertains to conditions for allowing Cenvat credit. Sub-rule (1) thereof provides that Cenvat credit in respect of inputs may be taken immediately on receipt of the inputs in the factory of the manufacturer. Sub-rule (2) pertains to conditions on which Cenvat credit could be taken on capital goods and reads as under:

(2) (a) The Cenvat credit in respect of capital goods received in a factory at any point of time in a given financial year shall be taken only for an amount not exceeding fifty per cent, of the duty paid on such capital goods in the same financial year:

Provided that the Cenvat credit in respect of capital goods shall be allowed for the whole amount of the duty paid on such capital goods in the same financial year if the said capital goods are cleared as such in the same financial year.

(b) The balance of Cenvat credit may be taken in any financial year subsequent to the financial year in which the capital goods were received in the factory of the manufacturer, if the capital goods, other than components, spares, and accessories refractories and refractory materials, moulds and dies and goods falling under Heading No. 68.02 and sub-heading No. 6801.10 of the First Schedule to the Tariff Act, are in the possession and use of the manufacturer of final products in such subsequent years.

Illustration.--A manufacturer received machinery on April 16, 2002, in his factory. Cenvat of two lakh rupees is paid on this machinery. The manufacturer can take credit up to a maximum of one lakh rupees in the financial year 2002-2003, and the balance in subsequent years.

As per the above provisions, Cenvat credit in respect of capital goods received in a factory in a given financial year could be availed of only up to 50 per cent. of the duty paid on such goods. The balance Cenvat credit could be taken in any financial year subsequent to the financial year in which the capital goods were received in the factory of the manufacturer, if the capital goods "are in possession and use of the manufacturer of final products in such subsequent years". Rule 4(2) of the Rules, thus, envisages availability of Cenvat credit to a manufacturer on receipt of capital goods in two stages. 50 per cent. of the credit is available in the year when such goods are received in a factory and the remaining 50 per cent. can be availed of in any financial year subsequent to the financial year in which the goods are received as long as such goods are in the possession and use of the manufacturer of final product in such subsequent years.

6. In the present case, admittedly, the capital goods were received during the financial year 2002-03. 50 per cent. credit on duty paid on such goods was, therefore, rightly taken by the manufacturer in such year. The manufacturer also thereafter took credit for the remaining 50 per cent. on April 1, 2004. The Revenue contends that since the said goods were not put in use for manufacture of final products till August 13, 2004, such credit was taken prematurely.

7. We find that under clause (b) of sub-rule (2) of rule 4, the Legislature has advisedly used the expression "are in the possession and use of the manufacturer of final products in such subsequent years". Stress, therefore, is on the capital goods being in the possession and use of the manufacturer for the purpose of final product in such subsequent year when the remaining 50 per cent. credit is sought to be availed of. We do not find that such rule ever insisted that such capital goods must have been put to use for the purpose of manufacture of final product. Had that been the intention of the Legislature, the language used in clause (b) of rule 4(2) would have been differently worded. In essence, therefore, to avail of 50 per cent, remaining credit, such goods should be in the possession and use of the manufacturer of a final product.

8. In fact, in the present case, admittedly the capital goods so received by the respondent continued to be in the possession and use on April 1, 2004 and thereafter also. In fact, such capital goods were utilised for the purpose of setting up of the laboratory. It can, therefore, not be stated that the goods were not in the possession and use of the manufacturer. The manufacturer puts such goods to use for setting up of the laboratory which ultimately would be used for the purpose of manufacture of the final product. Admittedly, the task of setting up the laboratory was completed on August 13, 2004. Under the circumstances, to our mind, the Tribunal cannot be stated to have misconstrued the Rules so as to allow the Cenvat credit to the respondent on April 1, 2004 itself. In the result, we answer the question in the affirmative, against the Department and in favour of the respondent. The appeal is accordingly, dismissed.

