

(2013) 01 JH CK 0057
In the Jharkhand High Court
Case No : Tax Appeal No. 13 of 2012

Commissioner of Central Excise

APPELLANT

Vs

M/s. Tata Motors Ltd.

RESPONDENT

Date of Decision : 15-01-2013

Acts Referred:

Citation : (2013) 296 ELT 7 : (2013) 39 STT 242

Hon'ble Judges : Prakash Chandra Tatiya, C.J; Jaya Roy, J

Bench : Division Bench

Judgement

1. Heard learned counsel for the parties at length. Learned counsel for the appellant assailed the order passed by the Tribunal i.e., Custom, Excise and Service Tax Appellate Tribunal, Kolkata, East Regional Bench, Kolkata passed in Excise Appeal No. 93 of 2006, dated 16.09.2011.

2. The appellant though has raised number of questions of law in the memo of appeal, however, three questions have been pressed specifically which are as under:

(i) Whether the Tribunal has erred in holding that the assessee becomes entitled to the entire amount of credit of Rs. 2.37 crores as refund and the assessee can file a refund claim before the appropriate authority which cannot be and should not be rejected on limitation ground and statutory provisions do not come in the way of refund of accumulated credit attributable to goods which have been exported?

(ii) Whether the Hon"ble Tribunal has erred in not appreciating the fact that the percentage calculated by the Cost Auditor is not a theoretical work-out but is based on hard facts backed by legal provisions as was being applicable during the material time and it is not correct to say that the percentage arrived by the Cost Auditor is theoretical or is devoid of any logic or rationale?

(iii) Whether the Tribunal has erred in holding in para 18 of the impugned order

that the impugned forgings and springs were not taken into account while calculating the Modvat credit on the inputs under the head "Work in Progress"?

3. Learned counsel for the respondent submitted that in view of the decision of Hon"ble Supreme Court delivered in the case of Samtel India Ltd. Vs. Commissioner of Central Excise, Jaipur, , no question of law arises in this appeal in view of the fact that the Hon"ble Supreme Court has already answered the question raised by the appellant and particularly, with, respect to the interpretation of sub-rule 4A which is identical to sub-rule 17 of rule 57F and which has been considered by the Hon"ble Supreme Court in earlier judgment delivered in the case of Eicher Motors Limited and Another Vs. Union of India and Others Etc., . Hon"ble Supreme Court has interpreted that "What was then sub-rule 4A is now sub-rule 17(a). Sub-rule 17(b) is identical to sub-rule 17(a) except that it is in respect of a different final product." Not only this but even when objection was raised with respect to non-challenging the validity of the rule, the Hon"ble Supreme Court observed that "once a validity of a provision is challenged and the validity is upheld by reading down that provisions, then it is not necessary that in all subsequent proceedings the validity must again be challenged. It is sufficient if a party claims that the provisions has to be read in the manner laid down by a judgment of Supreme Court. Then, Hon"ble Supreme Court applying the principle has laid down in Eicher Motors case (supra) that sub-rule 17 cannot be applied to vested rights Therefore, to the extent that the goods have already been exported, prior to March, 1997, the assessee would be entitled to a refund.

4. We are of the considered opinion that in this matter the total Modvat credit claimed by the petitioner was of Rs. 25,30,20,225/- and this claim was filed by the assessee with the Department vide three letters dated 28.03.1995, 06.04.1995 and 29.04.1995 relying on the proviso to Rule 57F(4A), the Tribunal observed that effectively the appellants believed that a sum of Rs. 39,24,703/- alone will lapse in view of Rule 57F(4A). The matter was examined by the Commissioner, Central Excise, Jamshedpur and Books of account of the assessee were audited by the Cost Accountant who, in his report dated 29.03.1998, stated that claim for Rs. 4,05,75,212.22 was inadmissible in different categories. On the basis of the report of Cost Accountant, a show cause notice dated 31.03.1998 was issued proposing to disallow credit of Rs. 4,05,75,212,22 under the provisions of Rule 57(ii) and for imposing penalty under Rule 173Q(1)(bb) and Rule 57I(4). The said order of the Commissioner was challenged before the Tribunal and the Tribunal remanded the matter vide order dated 31.12.2004 by a detailed order. In para 3.1 of the order dated 31.12.2004, the Tribunal specifically directed as under:-

Since the matter requires to be remitted back, in view of the findings for re-determination of quantum, the decision on other pleas of the (appellants is not arrived at, they are kept open for the appellants to agitate at the de novo hearing, and the adjudicator to consider and arrive at a finding thereon and on

liability to penalty interest, if any required to be imposed.

5. In view of the above, it is clear that the matter was remanded to the lower authority not only for re-determination of the quantum but with the liberty to assessee to agitate all its points. Thereafter, the matter was considered again and then the adjudicatory authority passed the order on 30.11.2005. The adjudicatory authority disallowed Rs. 2,37,70,000/- by said order which has been challenged by the assessee before the Tribunal wherein this impugned order dated 16.09.2011 was passed.

6. The learned Tribunal relied upon the judgment of the Hon"ble Supreme Court delivered in the case of Samtel India Ltd. Vs. Commissioner of Central Excise, Jaipur, and held that Rule 57F(17) cannot override vested rights in view of the Supreme Court judgment and the earlier judgments of 2000 (122) ELT 596 and 2002 (146) ELT 631 stand overruled. The Tribunal also considered the plea of the Revenue with respect to their grievance that refund could not have been ordered in these proceedings as well as claim of refund became barred by time. The Tribunal held that Rule 57F(4) provides the mode of utilization of credit for payment of duty and where it is not possible for any reason, by refund to the manufacturer and this point has been considered in detail. Thereafter, the objection with respect to the bar of limitation has also been considered by the Tribunal in detail in para 12 and 13. The Tribunal in para 15 also observed that the inputs lying in stock inputs contained in work in process lying in stock and inputs contained in forgings and springs have not been considered which has been considered by the Tribunal on the basis of material available before the Tribunal and passed this order. We are of the considered opinion that in fact the issue sought to be raised by the appellant-Revenue is already answered by Hon"ble Supreme Court in the case of Samtel India Ltd. Vs. Commissioner of Central Excise, Jaipur, and, therefore, in this appeal no question of law arises including with respect to the other two issues. The objection of the Revenue that in this very proceeding refund could not have been ordered or the claim of the assessee became barred by time, we are of the considered opinion that when the order with respect to disallowance itself had not become the final, before that the claim of refund could not have been raised by the assessee. Therefore, during the pendency of his claim for Modvat allowance itself was under consideration wherein the authority had jurisdiction to pass appropriate order with respect to the entitlement of Modvat benefit to the assessee, then in that situation, the assessee could not have moved any application for refund of the said amount which would have been in air. In this situation also, the question of bar of limitation in fact cannot apply and, therefore, there arises no question of law in this appeal.

Hence, the appeal of Revenue is dismissed.