(2001) 06 BOM CK 0024

In the Bombay High Court

Case No : Miscellaneous Civil Application No. 549 of 2000

Commissioner of Central Excise — APPELLANT

Vs

Nestle India Ltd. — RESPONDENT

Date of Decision : 29-06-2001

Acts Referred:

Central Excise Rules, 1944 — Rule 57Q, 57U
Central Excises and Salt Act, 1944 — Section 35H(1)

Citation : (2002) 1 BomCR 307

Hon'ble Judges : K.K. Baam, J;A.S. Aguiar, J

Bench : Division Bench

Advocate : V.P. Thali, Central Govt. Standing, for the Appellant;

Judgement

K.K. Baam, J.—This application is made on behalf of the applicant, Commissioner of Central Excise, Goa, seeking a direction that under sub-section (1) of section 35-H of the Central Excise Act, 1944, the Appellate Tribunal be directed to refer to the High Court, the question of law referred to in paragraph 8, which reads as under :-

"1. Whether the Show Cause Notice issued under Rule 57-U of the Central Excise Rules, 1944, requires to state any ground on which the denial of credit is founded?

2. Whether from the Show Cause Notice issued under Rule 57-U of the Central Excise Rules, 1944, read with the reply filed by the assessee on 23-8-95 could it be said that the Assistant Commissioner had travelled beyond the allegations in the said Show Cause Notice?

3. Whether the Show Cause Notice issued under Rule 57-U of the Central Excise Rules, 1944, could be said to be bad in law as regards the goods specified in Annexure B thereto for want of a specific ground mentioned in the notice that the goods were not admissible in terms of Rule 57-Q of the said Rules?

4. Whether the Show Cause Notice issued under Rules 57-U of the Central Excise

Rules, 1944, for recovery of inadmissible Modvat Credit availed of by the assessee, could have been held as bad by CEGAT merely on the ground of not mentioning in the Show Cause Notice that the goods were not covered under 57-Q, and whether the CEGAT had jurisdiction to override the express provisions of Rule 57-U?"

2. Though notice has been served upon the respondents, the respondents have not cared to remain present in Court.

3. On behalf of the applicant, reliance is placed upon the Show Cause Notice at Exh. A by which the respondents have engaged in the manufacture of excisable goods falling under Chapter Sub-Head 1905.11 of the Central Excise Tariff Act, 1985 and contravening the provisions of Central Excise and Salt Act, 1944 and the rules made thereunder.

4. The Show Cause Notice has been issued in respect of MODVAT credit as under :-

a. Credit to the tune of Rs. 5,29,411.20 on Capital Goods as detailed in Annexure A to the Notice;

b. Credit amounting to Rs. 12,99,668.57 on Capital Goods detailed in Annexure B, which have not been declared by the respondents, thereby contravening the provisions of Rule 57-T(1) of the Central Excise Rules, 1944.

c. The respondents have also taken MODVAT credit to the tune of Rs. 96,775.00 on Capital Goods as detailed in Annexure C to the Notice, which is not admissible in terms of Rule 57-Q and which is also not been declared by the respondents as required under Rule 57-T(1) of the aforesaid rules.

5. The respondents under the said notice were, therefore, required to Show Cause to the Assistant Commissioner of Central Excise Division as to why the total amount of Rs. 19,25,854.77 as indicated in Annexure A, B and C attached to the notice, should not be denied and recovered under the provisions of Rule 57-U of the Central Excise Rules, read with section 11-A of the said Central Excise Tariff Act.

6. With regard to the Show Cause Notice, an order was passed by the Assistant Commissioner of Central Excise against which an appeal was preferred by the respondents herein. The Commissioner (Appeals), Central Excise Mumbai, vide his order dated 30th June, 1999, set aside the order of the Assistant Commissioner and referred the matter for de novo consideration, as per the directions contained in his order. The respondents herein thereafter filed an appeal before the Custom, Excise and Gold (Control) Appellate Tribunal. Appellate Tribunal West Regional Bench at Mumbai, after hearing the parties, vide its Order dated 11th February, 2000, observed that the language of the Show Cause Notice makes it clear that the allegation regarding the goods covered under Annexure B was limited to the non-declaration alone and that the assesses were not put to notice to justify the eligibility thereof under Rule 57-Q.

In proceeding to examine the eligibility, the Assistant Commissioner clearly transgressed beyond the jurisdiction and, therefore, the appeal was allowed and the order of the commissioner to the extent of examining the eligibility of the goods mentioned in Annexure B, were rejected.

7. Shri Thali, who appears on behalf of the applicant, has pointed out that in the reply filed by the respondents herein, the respondents have understood the contents of this Show Cause Notice as they have in terms stated that the above-mentioned goods, namely goods under Annexures A, B and C, are clearly covered within the Explanation to Rule 57-Q and are, therefore, eligible for MODVAT credit. In their reply at para 2, they have stated the purpose for which the goods were utilized and, therefore, covered by the Explanation to Rule 57-Q. Whilst giving their reply, they have also stated in respect of the items mentioned at Annexure B, as under :-

"(b) ITEMS MENTIONED IN ANNEXURE ''B'' : All these items are used in our manufacturing process and we have filed the declarations for all these items with the Assistant Collector Central Excise, Panjim, as well as The Superintendent of Central Excise, Usgao Range. We can produce the acknowledgement of these declaration for your verification at the time of personal hearing. All the items mentioned in Annexure ''B'' are connected with our process like air dryer filters, evaporator, condenser, etc. The 33 KVA power distribution system has been installed in the factory for power supply to the process area."

8. The respondents have in their reply also set out the fact that the goods were used in the production process and MODVAT benefit should be allowed, for which reference has been made to Rule 57-Q of the Rules as also to the definition of "Capital Goods". Whilst submitting their reply and making reference to the Central Sales Tax Act, Central Excise Rules and Explanation to Rule 57-Q, reference is made to the fact that the two provisions are similar to each other and under both provisions benefit is given to the assessee if the goods purchased by him are used as processing material, machinery, plant, equipment, tools, stores, spares parts, accessories, etc. Whereas in the sales tax provisions the benefit is given if the goods are "used in the manufacture or processing of goods", under the MODVAT provisions the benefit of MODVAT is given if the capital goods are used for "producing or processing of any goods or for bringing about change in any substance for the manufacture of final products". The words "used for producing or processing of any goods or for any change in any substance for the manufacture of final product" is much wider in meaning than "used in the manufacture or processing of goods", as mentioned in the Central Sales Tax Act.

9. In para 5 of the reply filed by the respondents, it is therefore stated that the relevant provisions under the Central Sales Tax and Central Excise Rules are similar to each other. The judgments mentioned in para 4 of the reply will apply directly to the interpretation of the expression "used for producing or processing of any goods or for bringing about any change in any substance for the

manufacture of the final product". The respondents have also stated that the goods in Annexure B are, therefore, clearly eligible for MODVAT credit as per the Explanation to Rule 57-Q and that they had not contravened any of the provisions of the rules for taking such credit.

10. The respondents are not present before the Court. They have not cared to file any affidavit. They have replied to the Show Cause Notice. There is no challenge to this petition. Hence, in view of the fact that the Show Cause Notice as understood by the respondents, made a reference to Rule 57-Q, the respondents have given a reply to the said Show Cause Notice as understood by them. It cannot be contended that the adjudicating authority has travelled beyond the Show Cause Notice. In view of the fact that the assessee offered an explanation with specific reference to Rule 57-Q, the applicants herein are entitled to the relief prayed for.

11. Hence, u/s 35-H(1) of the Central Excise Act, the Appellate Tribunal is directed to refer to the High Court the question of law as referred to in para 8. Application stands disposed of.

