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(2014) 11 GUJ CK 0078

In the Gujarat High Court

Case No : Tax Appeal No. 1017 of 2014

Commissioner of Central Excise APPELLANT

Vs

United Phosphorus Ltd. RESPONDENT

Date of Decision : 24-11-2014

Acts Referred:

Citation : (2015) 315 ELT 360 : (2015) 51 GST 559

Hon'ble Judges : V.M. Pancholi, J;Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : R.J. Oza, Advocates for the Appellant

Judgement

Akil Kureshi, J.—Draft amendment dated 24-11-2014 is allowed. In the amended form, the question of law presented for our consideration by the Revenue in this appeal is as under:

"2(a) Whether in the facts and circumstances of the case, the Tribunal has committed substantial error of law in holding that Modvat Credit is available to the respondent on capital goods viz. Pipes, cables, valve, cooling tower, etc. used in the erection of power plant for generation of electricity by relying upon decision rendered by Chennai Bench of Tribunal in the case of Kothari Sugar & Chemicals Ltd. reported in 2006 (196) E.L.T. 35(T) which has not attained finality and CMA No. 2671/2007 filed against the said decision is admitted and pending for final decision before the Hon''ble High Court of Madras at Chennai?"

2. Having heard the learned counsel for the Revenue and having perused the impugned decision of the Customs, Excise & Service Tax Appellate Tribunal, it emerges that the sole issue involved in this Tax Appeal relates to the assessee''s claim for Modvat Credit on the capital goods used in generation of electricity, which was captively consumed. According to the Revenue, the assessee would not qualify for such credit in view of Rule 57Q of the Central Excise Rules, 1944. The Tribunal, however, relied on the decision of Chennai Bench in case of Kothari Sugars & Chemicals Ltd. v. Commissioner of Central Excise, Trichy reported in

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2006 (196) E.L.T. 35, held in favour of the assessee. In such decision, the Tribunal had come to the following conclusion:

"2. Yet another decision of the Tribunal (Division Bench) which is in favour of the assessee on similar set of facts is in the case of Commissioner of Central Excise, Raipur v. Jindal Steel and Power Ltd. (2003 (158) E.L.T. 178 (Tri.-Del.)), wherein capital goods credit was allowed in respect of capital goods used in power plant for manufacture of steel, to generate electricity, which was mainly used captively and partly sold out to MPEB. The submission of the assessee in that case that Rule 57R did not stand in the way of availment of such credit was not rejected by the Tribunal. Ld. Counsel has also cited two final orders of this Bench, one of which was passed in their own case. I am, however, unable to find support to the assessee''s argument on the aforesaid issue from any of these orders which did not consider Rule 57R at all. Nevertheless, the Division Bench decision cited by ld. Counsel are squarely in their favour and consequently the impugned order gets set aside and this appeal is allowed."

3. The Tribunal in case of Kothari Sugars & Chemicals Ltd. (supra), had proceeded on the basis that the capital goods were used for generation of electricity which was mainly used captively. In the present case also the Tribunal has recorded that, "It is undisputed in the case in hand that appellants have been consuming the electricity mostly in their factory premises and little surplus electricity was sold and put into electricity board."

4. We have proceeded on the basis of such admitted facts. Quite apart from the decision of the Chennai Bench in case of Kothari Sugars & Chemicals Ltd. (supra), we are informed, is carried in appeal before the Madras High Court and is pending, we notice that the Supreme Court in case of Collector of Central Excise Vs. Solaris Chemtech Limited and Others, has occasion to deal with a substantially similar issue. It was held that when inputs are used to generate electricity which are captively consumed for manufacture of final product, the assessee would be entitled to Modvat Credit in view of the expression "used in relation to the manufacture" used in the statute.

5. The situation might have been different had the Revenue succeeded in establishing that the electricity generated by the assessee was not used captively but sold outside. In the result, tax appeal is dismissed.

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