(2012) 02 BOM CK 0152

In the Bombay High Court

Case No : Central Excise Appeal No. 25 of 2011

Commissioner of Central Excise, Nagpur APPELLANT

Vs

Central Cables Pvt. Ltd. RESPONDENT

Date of Decision : 24-02-2012

Acts Referred:
Central Excises and Salt Act, 1944 — Section 11A, 35G(1)

Citation : (2013) 287 ELT 56

Hon'ble Judges : B.P. Dharmadhikari, J;A.B. Chaudhari, J

Bench : Division Bench

Advocate : S.K. Mishra, ASGI, for the Appellant; Gajendra Jain . Advocate, for the Respondent

Final Decision : Allowed

Judgement

B.P. Dharmadhikari, J.—In view of the earlier judgment in the matter, dated 13-10-2010 [Commissioner of C. Ex. Vs. CEGAT,], this Court issued notice on 21-12-2011 and effort was made to dispose of the matter finally in the light of question of law as formulated and arising as substantial question in this appeal u/s 35G(1) of Central Excise Act, 1944. Shri Mishra, learned Assistant Solicitor General of India for the petitioner and Shri Jain, learned counsel for respondents No. 1 to 4, were heard on 17-1-2012 and then the learned counsel for the respondents was given more time to cite relevant judgments. After hearing him on 7-2-2012, the judgment came to be reserved.

2. The substantial question of law which falls for determination is:

Whether the Hon''ble CESTAT was correct in not following the mandate of judicial discipline and in not considering the direction raised in para 6 of the Hon''ble High Court order dated 19-3-2010 i.e. "The question as to whether the Central Cables Pvt. Ltd., had transferred the raw materials to the job workers, if transferred the goods for manufacture of intermediate product, then how the job worker could take credit of duty paid by Central Cables Pvt. Ltd. On raw materials purchased from MMTC under actual user conditions. Similarly, if the respondent Nos. 2 to 4 were the job workers and after manufacturing the intermediate products were liable to return the goods to the suppliers of raw materials, namely, Central Cables Pvt. Ltd., then where was the question of their returning the manufactured goods on payment of duty has not been considered by any of the Authorities below. If the job worker was not liable to pay excise duty while returning the manufactured goods to the supplier of raw materials, then the question of the supplier of the raw materials claiming full credit under Rule 57B of the Central Excise Rules, 1944, does not arise at all.

3. We find it convenient to narrate the facts from earlier judgment of this Court dated 13-10-2010 in CEL Reference No. 4 of 2003. M/s. Central Cables Private Limited, Respondent No. 2 therein, had purchased aluminum/copper rods from MMTC for their actual use on the strength of quota allotted to them under regular gate passes in their own name. On receipt of the said goods, the Central Cables Private Limited claims to have transferred the aluminum/copper rods to their job workers, namely, respondent Nos. 3 to 5 for manufacture of intermediate products, namely, aluminum/copper wires by endorsing the gate passes. Admittedly, the Central Cables Pvt. Ltd. have paid job work charges at the rate of Rs. 2/- per kg. to respondent Nos. 3 to 5 and after manufacturing wires, the job workers have not only returned the manufactured goods, but also returned the wastes arising in the process of manufacture of wires to the Central Cables Pvt. Ltd. It appears that the job workers, who are small scale industrial units have paid confessional rate of duty while returning the goods to Central Cables Private Limited and the Central Cables Private Limited have claimed full credit under Rule 57B of the Central Excise Rules, 1944.

4. After remand by this Court, CESTAT has passed fresh order on 23-2-2011 [2012 (275) ELT 588] signed on 2-3-2011 and facts noticed in said para are as under:

The said order was passed in respect of show-cause notice No. V(15)01/89/ Adj./21457 dated 8-6-1989 wherein M/s. Central Cables (P) Ltd., the Appellant and the three job workers, namely M/s. Omega Scientific Co., M/s. Vidarbha Cables and M/s. Central Capacitors Co. Pvt. Ltd. were made parties. The allegation in the show cause notice was that the assessee was procuring copper and aluminum products falling under Chapter 74 and 76 of the Central Excise Tariff Act, 1985, on payment of duty as inputs and the goods, which were received in their own name, were transferred to the three job-workers by endorsing the concerned gate passes without accounting for the same in the statutory RG23A Part I and II register and making entries of these goods in the private store accounts. The job-workers, who received these goods, took credit of the duty paid on the strength of the endorsed gate passes and manufactured wires and cleared the same on payment of duty availing confessional rate of duty under Notification No. 175/86 dated 1-3-1986 and transferred the manufactured wires to the assessee. The assessee took credit of the duty paid by the job-workers under Notification 175/96-C.E. at the enhanced rate as provided for in para 5 of the said Notification read with Rule 57B of the Central Excise Rules, 1944. The allegation is that since the job-workers are manufacturing intermediate products and the assessee was receiving the raw materials, they should have followed the procedure under Rule 57F of the said Rules where under the assessee should have taken the credit of the duty paid on the raw material and dispatched the goods for manufacture on job work basis to the job-workers who in turn should have manufactured the goods and cleared the same to the assessee without payment of duty under Notification No. 214/86-C.E. as amended. In other words, the allegation was that the assessee was not entitled to avail the higher modvat credit under Rule 57B read with Notification No. 175/86 and they should have necessarily followed the procedure. The adjudicating authority, who examined the matter came to the conclusion that the transaction between the job-workers and the principal-manufacturer, namely, M/s. Central Cables Pvt. Ltd., is fully covered under the scope of Rule 57F(2) of the Central Excise Rules, 1944, read with Notification 214/86 dated 2-4-1986 and hence the higher notional credit taken by the assessee under Rule 57B was not permissible for such transactions because, they were sending their own goods for job-work and receiving them back and the ownership never changed hands. Accordingly, the adjudicating authority confirmed an amount of Rs. 16,44,436=91 short-paid/excess credit taken u/s 11A of the Central Excise Act, 1944. He imposed a penalty of Rs. 1.5 lakh on the assessee under Rule 173Q and penalty of Rs. 25,000/- each on three job-workers under Rule 173Q read with Rule 209A of the Central Excise Rules, 1944.

5. The High Court on 13-10-2010 had framed three questions and remanded the matter back to CESTAT (CEGAT) for deciding the same in accordance with law. Though in that judgment question numbers are not given and questions appear one after the other, while reproducing said para below, we have found it appropriate to add those question numbers for convenience.

(1) The question as to whether the Central Cables Pvt. Ltd. had transferred the raw materials to the job workers, if transferred the goods for manufacture of intermediate product, then how the job worker could take credit of duty paid by Central Cables Pvt. Ltd. on raw materials purchased from MMTC under actual user conditions has not been considered by the Authorities below. (2) Similarly, if respondent Nos. 3 to 5 were the job workers and after manufacturing the intermediate products were liable to return the goods to the suppliers of raw materials, namely, Central Cables Pvt. Ltd., then where was the question of their returning the manufactured goods on payment of duty has not been considered by any of the Authorities below. (3) If the job worker was not liable to pay excise duty while returning the manufactured goods to the supplier of raw materials, then the question of the supplier of the raw materials claiming full credit under Rule 57B of the Central Excise Rules, 1944, does not arise at all.

6. Shri Mishra, learned ASGI in above background has contended that the

questions whether Central Cables Private Limited transferred raw material to job worker or then if it was only supplied, how job worker could take credit of duty paid by Central Cables Private Limited, are not addressed to by CESTAT. For said purpose, he has taken us through the High Court judgment and also impugned order of CESTAT.

7. Shri Jain, learned counsel for respondents No. 1 to 4, has cited several judgments and has handed over compilations on both occasion on which he was heard. He argues that obligation to pay excise duty is always upon manufacturer and job worker is recognized as manufacturer. He also contends that though small scale unit has been given concession in payment of excise duty, the establishment like M/s. Central Cable receiving such duty paid intermediate product from small scale unit, is entitled to avail credit for full excise duty ignoring the concession granted. He argues that as this position is settled, no substantial question of law arises and the appeal needs to be dismissed. For said purpose, he has invited our attention to certain judgments.

8. After hearing respective counsel, we are satisfied that substantial question of law as framed above, falls for determination in present matter. The impugned order passed by CESTAT shows that questions No. 2 & 3 as formulated by this Court for consideration of CESTAT may be said to have been answered by it but then there is no answer to question No. 1. The aluminum/copper rods are purchased as per quota by M/s. Central Cables Private Limited and it has transferred/supplied that raw material to its job workers directly without undertaking any manufacturing process or operation upon it. The said shifting of raw material is by endorsing the gate passes. Central Cables Private Limited has paid job work charges @ Rs. 2/- per kg. to said job workers who are respondents No. 2 to 4 in present appeal.

9. In the background of these facts, when application of mind by CESTAT is looked into, CESTAT has in para 3 of impugned order made reference to judgment of this High Court in the case of Impact Containers Pvt. Ltd. Vs. Asstt. Collector of C. Ex., Bombay, . But then has found that the aluminum ingots were supplied directly to job worker by Impact Containers and job worker took credit of duty paid on aluminum ingots and discharged duty liability on plain aluminum tubes. Reliance has been placed upon this judgment in paras 6 and 7 of impugned order to allow the appeal filed by all respondents. The perusal of judgment in the case of Impact Containers, particularly para 3 reveals that the Impact Containers received aluminum ingots as actual users from the producers of primary aluminum and on said purchases it paid the excise duty. The said fact is lost site of or its impact in the present matter has not been considered by CESTAT. If M/s. Central Cables Private Limited enjoys quota facility from manufacturers of primary aluminum and copper, and it purchases the same, the question which arises is whether the credit for excise duty could have been allowed to be taken by job worker to whom the raw material is usually supplied/ shifted only for further processing. This aspect which specifically required answer

because of question No. 1 as formulated by this Court, has not been looked into by CESTAT. The question has got bearing on nature of arrangement between M/s. Central Cables Private Limited and its job workers. Nature of arrangement between M/s. Impact Containers and the job workers or then between job workers inter se is not very clear. The facts do not show that any of the job workers were S.S.I. Thus, the question of present nature did not fall for determination in said matter. Question Nos. 2 & 3 as formulated by this Court used the word "if" and finding out correct answer to question No. 1 is essential as that answer has got vital bearing on answers to questions No. 2 & 3.

10. As we find that CESTAT has not correctly applied the mind to present facts, we quash and set aside the judgment and order dated 23-2-2011 in Appeal Nos. E/2850 to 2853 of 1990 and restore those appeals back to file of CESTAT for fresh consideration in accordance with law. The substantial question of law is thus answered in favour of the appellant and Respondent No. 5-Tribunal is directed to take fresh decision on all questions as formulated in para 6 of judgment dated 13-10-2010 by this Court in Central Excise Reference No. 4 of 2003. CESTAT to attempt to decide the appeals as early as possible. Central Excise Appeal No. 25 of 2011 is accordingly allowed with no order as to costs.

