(2017) 03 AHC CK 0023

In the Allahabad High Court

Case No : Central Excise Appeal No. 248 of 2009

Commissioner of Customs APPELLANT

Vs

M/s. Kesar Enterprises Ltd. Bareilly RESPONDENT

Date of Decision : 20-03-2017

Acts Referred:
Central Excise Rules, 1944 — Rule 52-C, Rule 57-A, Rule 57-AD, Rule 57-CC

Citation : (2017) 5 ADJ 69

Hon'ble Judges : Bharati Sapru and Saumitra Dayal Singh, JJ.

Bench : Division Bench

Advocate : Central Excise Appeal No. 248 of 2009; Shambhu Chopra, C.S.C. and Vinod Kant Srivastava, Advocates, for the Appellant; B.J. Agrawal and Piyush Agrawal, Advocates, for the Respondent; Central Excise Appeal No. 37 of 2009; C.S.C and Parv Agrawal, Advocate, for the Appellant; Piyush Agrawal and Ms. Sanyogita Singh, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

1. We have heard Sri Bharat Ji Agarwal learned senior counsel assisted by Ms. Sanyogita Singh learned counsel for the appellant and Sri Praveen Kumar learned counsel for the department and have also perused the record.

2. As the controversy involved in these appeals is identical, the same is being decided by a common judgment and order treating the Central Excise Appeal no.248 of 2009 as the leading case.

3. The Central Excise Appeal no.248 of 2009 has been filed by the department against the order of Custom, Excise & Service Tax Appellate Tribunal dated 26.8.2008 by which the tribunal has dismissed the appeal filed by the department. The appeal has been filed proposing the following seven questions of law :

"1. Whether the appellate tribunal has committed error of law by not appreciating the fact that no MODVAT credit can be taken in respect of the levy molasses which is used as input for manufacture of country liquor a non-excisable project and are under control of the State Excise Authorities ?

2. Whether the appellate Tribunal failed to appreciate that free sale Molasses is used in manufacture of dutiable final products including denatured spirit and special denatured spirit and exempted products like rectified spirit, Extra Neutral Alcohol and Indian Made Foreign Liquor which is non-excisable commodity and as such it cannot be equated with the use of Levy Molasses used as input exclusively in manufacture of country liquor a different final product ?

3. Whether the appellate tribunal was justified in not drawing a distinction between the use of free sale molasses and levy molasses which are used as input in manufacture of different Final products and further failed to consider that no MODVAT credit on reserve quantity of levy molasses at all admissible to the party as the same is allotted by the State Excise Authorities ?

4. Whether the appellate Tribunal failed to consider and discuss the basic point in issue of MODVAT credit on levy molasses and illegality dismissed the departmental appeal with out recording any reason for not upholding the specific finding of fact and grounds furnished by the departmental ?

5. Whether in the instant case, the appellate tribunal has misapplied and misinterpreted the ratio of its own earlier final order dated 14.8.2000 reported in 2001 (130) ELT 93 (-Del). The relied upon ratio pertains to the case where the assessee were asked by the department to pay an amount equal to 8% of the price second category of final product i.e. Indian Made Foreign Liquor (IMFL) manufactured out of the Rectified Spirit (RS). The tribunal set aside the departmental order and held that 8% of sale price of Rs. i.e. first category of final product was chargeable under erstwhile Rule 57-CC/57-AD of CER, 1944. Thus the relied upon case has no relevance to the instant case ?

6. Whether the Rule 57AD is applicable in respect of the levy molasses which is used by the manufacturer exclusively in the manufacture of country liquor. Country liquor is manufactured out of the quota of molasses allotted by the controlling authority of molasses i.e. Excise Commissioner (U.P). Such quantity of molasses is being allotted to the distillery of the manufacturer which is known as levy molasses on the condition that the entire quantity of molasses shall be used exclusively in the manufacture of country liquor (Deshi Sharab).

7. Whether the credit of input will be available to the manufacturer, if such inputs are exclusively used for manufacture of non-excisable final products. The credit of inputs under Rule 57A of Central Excise Rules, 1944 is available to the manufacturer if such inputs are used in the manufacture of such finished excisable goods only as the Central Government may specify in this behalf by way of notification. The manufacturer''s final product namely country liquor is not an excisable product and as such no MODVAT facility will be admissible in respect of levy molasses used in the manufacture of final product which is not an excisable commodity ?"

4. From the perusal of the order of tribunal dated 28.8.2008, it is clear that while dismissing the appeal, the tribunal has followed its earlier order passed in the case of the respondent assessee reported in 2002 (147) ELT 293 (Tri.-Del) (Kesar Enterprises Ltd. v. Commissioner of Central Excise, Lucknow) wherein the tribunal had held as under :

"4. The issue involved in the present appeal is as to whether the appellants are entitled to avail Modvat credit in respect of levy molasses used for manufacture of spirit which is turn was used by them for the manufacture of the country liquor and whether provisions of Rule 57CC of the Rules were applicable to them or not. This very issue came up for debate and discussions/adjudication before the Tribunal in the appellant''s own earlier case wherein the Modvat credit, in the similar circumstances, was sought to be denied by the Revenue on the levy molasses used by the appellants for manufacture of rectified spirit which was thereafter used for the manufacture of Indian made foreign liquor (IMFL) (Non-excisable). The tribunal vide final order dated 27.3.2000 held that the appellants were entitled to avail Modvat credit on the levy molasses and they were liable to pay the amount at the rate of 8% on the value of the rectified spirit being cleared for manufacture of IMFL in terms of Rule 57CC of the Rules as the said rule was applicable to their case. The tribunal dismissed the appeals of the Revenue which were preferred against the order-in-appeal dated 27.3.200. This fact has not even been disputed by the learned SDR. That judgment of the tribunal is binding on the Revenue and covers the controversy involved in the present appeal also completely.

5. In view of the judgment of the tribunal in the earlier case of the appellants, referred to above, the earlier order of the Commissioner (Appeals) Confirming the original order of the A.C. denying the Modvat credit on levy molasses and imposing penalty in both the appeals, cannot be legally sustained and deserves to be set aside. The matter deserves to be sent back to the adjudicating authority for determining the amount at the rate of 8% of the value of the rectified spirit cleared by the appellants during the disputed period for the manufacture of C.L. in terms of Rule 57CC of the Rules."

It has further been brought to our knowledge that the aforesaid order of the tribunal was carried in the appeal to this court wherein while vide judgment and order dated 9.1.2017 this court has observed as under:

"3. In fact by means of judgment and order dated 7.12.2001 Tribunal has remanded the matter to Adjudicating Authority to determine amount at the rate of 8% per cent, payable or reversible, by assessee in terms of Rule 57CC and also to decide question of imposition of penalty, if any, imposed on assessee in the light of discussions made in the judgment of tribunal."

5. Thus the disputes stand settled in so far as its entitlement to Modvat credit upto the extent of 8% of the value of rectified spirit cleared by the respondents inasmuch it has now stand decided that the respondent assessee is entitled to

that much of Modvat credit.

6. In the instant case, there is no dispute of claim in excess of 8% of the value of rectified spirit by way of Modvat credit inasmuch as the tribunal has by its impugned order, held the respondent assessee to be entitled to claim Modvat credit on the levy molasses only upto the extent of 8% of the value of rectified spirit being cleared for manufacture of IMFL.

7. In view of the lack of dispute as to the quantification of the Modvat credit, we are of the opinion that the question raised in the appeal stand covered by the earlier decision of this court in Central Excuse/Reference no.1 of 2002 decided on 9.1.2017.

8. Accordingly the appeals fail stand dismissed. No costs.

