(2014) 06 KAR CK 0084

In the Karnataka High Court

Case No : CEA No. 42 of 2011

Commr. of C. Ex. and Service Tax APPELLANT

Vs

Biocon Ltd. RESPONDENT

Date of Decision : 19-06-2014

Acts Referred:
Central Excises and Salt Act, 1944 — Section 2(e), 2(k)

Citation : (2014) 309 ELT 66

Hon'ble Judges : N. Kumar, J;B. Manohar, J

Bench : Division Bench

Advocate : N.R. Bhaskar, CGSC, Advocate for the Appellant; N. Anand for Ravishankar, Advocate for the Respondent

Judgement

N. Kumar, J.—The Revenue has preferred this appeal challenging the order 2012 (279) E.L.T. 101 (Tribunal)] passed by the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Bangalore (hereinafter referred to as ''the Tribunal'' for short), wherein the Tribunal has confirmed the order passed by the Commissioner of Central Excise (Appeals) who allowed proportionate CENVAT Credit availed in respect of furnace oil used in production of steam/power supplied to EOU belonging to the same company. Assessee is the holder of Central Excise registration for manufacture of excisable goods falling under the Central Excise Tariff. They are availing Modvat/Cenvat credit of duty on the inputs/capital goods and services under the Cenvat credit Scheme and are utilizing the same towards payment of duty on their final products. The assessee is procuring the furnace oil and utilized the same for generation of steam/ electricity and are availing Cenvat credit on the furnace oil. The assessee was also utilizing the furnace oil for generation of steam/electricity which was used in another unit, an EOU situated in the same compound. The grievance of the Revenue is that the proportionate Cenvat credit on furnace oil utilized in the generation of Steam/Electricity cleared to their EOU was not reversed as required in terms of Rule 57AD(2) of Central Excise Rules, 1944 read with Rules 6(2) & (3) of Cenvat Credit Rules, 2001/2002/2004. Therefore, two show cause notices were issued by the Additional Commissioner of Central Excise, Bangalore-I to the assessee demanding reversal of Modvat/CENVAT Credit amounting to Rs. 42,02,282/- on furnace oil utilized in the manufacture of Steam/Electricity transferred to the EOU during the period 2001-02 to 11/05. Interest as applicable and penalty was also proposed in the above show cause notices.

2. The assessee filed its objections contending that the electricity generated has been used in their EOU unit which is the same factory premises, which was also factory of production. Even if the EOU procures inputs/capital goods for generation electricity the respondent entitled to procure the same without payment of duty in terms of the Foreign Trade Policy. Therefore, they requested for dropping of the proceedings. The Assessing Authority after considering the rival contentions and taking note of the statutory provisions on which reliance was placed as well as the judgments of various courts confirmed the demand of CENVAT Credit of Rs. 8,42,386/- and Education Cess of Rs. 16,905/- under Rule 14 of CENVAT Credit Rules, 2004 for the period from 16-05-2005 to 30-11-2005.

3. Being aggrieved by the said order, the assessee preferred an appeal to Commissioner of Central Excise (Appeals)-I, Bangalore (hereinafter referred to as ''the First Appellate Authority''). The Appellate Authority relying upon the judgment in the case of M/s. SRF Ltd. v. CCE, Chennai reported in 2005 (191) E.L.T. 887 (Tribunal-Chennai) held that the assessee has used the electricity generated partly in the unit where the electricity is generated and partly used in the other units which is situated in the very same premises is entitled to the benefit of Cenvat Credit and accordingly the order passed by the Assessing Authority was set aside and the appeal was allowed. Being aggrieved by the said order, the Revenue preferred an appeal to the Tribunal. The Tribunal relying on the decision of the Tribunal in 2001 (96) ECR 273 which has been upheld by the Hon''ble Supreme Court [2007 (216) E.L.T. A23 (S.C.)] wherein it was held that the factories are situated in the same compound are to be treated as one and the units have to be treated as single factory. The order passed by the Commissioner was in accordance with law and therefore the Tribunal dismissed the appeal filed by the Revenue. Aggrieved by the said order, the Revenue is in appeal.

4. The question of law that arises for our consideration in this appeal is:

"When the assessee who manufacture the steam, use the same in the factory of manufacturing and also utilized the steam in its another unit which is situated in the same compound, is he entitled to CENVAT Credit proportionately to the extent which was used in the other unit?"

5. Learned counsel for the Revenue assailing the impugned orders passed by the appellate authority contended that, having regard to the definition of "input", the assessee would be entitled to the benefit of Cenvat credit only to the extent of steam manufactured out of furnace oil is used in the factory for its production. Even if such a steam is utilized by it in other unit in the same compound, it amounts to wheeling out or diverting the steam to another unit and the assessee

is not liable for Cenvat credit. In support of their contention, the assessee relied upon a judgment in the case of Vikram Cement Vs. Commnr. of Central Excise, Indore, as well in the case of Maruti Suzuki Ltd. Vs. Commissioner of Central Excise, Delhi-III, .

6. Per contra, learned counsel appearing for the assessee submitted that when the assessee establishes two units in the same compound, both of them falls within the definition of "premises" under the Act and when both the units are manufacturing excisable goods, the steam manufactured in the factory of production even if it is used in the other unit, is eligible for CENVAT Credit and therefore the orders passed by the appellate authorities are in accordance with law and cannot be found fault with. In support of his contention, he also relied upon a judgment reported in Ramala Sahkari Chini Mills Ltd., U.P. Vs. Commissioner Central Excise, Meerut-I, , where the judgment of the Hon''ble Supreme Court in Maruti Suzuki Ltd. (supra) was doubted and referred to a Larger Bench.

7. In order to answer the aforesaid question, it is necessary for us to look into the statutory provisions. The word "input" has been defined under CENVAT Credit Rules, 2004 at Section 2(k), which reads as under:

"2(k) "input" means -

(i) all goods, except light diesel oil, high speed diesel oil and motor spirit, commonly known as petrol, used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not and includes lubricating oils, greases, cutting oils, coolants, accessories of the final products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam in or in relation to manufacture of final products or for any other purpose, within the factory of production;

(ii) all goods, except light diesel oil, high speed diesel oil and motor spirit, commonly known as petrol and motor vehicles, used for providing any output service;"

The aforesaid definition makes it clear that, "input" means all goods used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final products or not and includes lubricating oils, greases, cutting oils, coolants, accessories of the final products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used in or in relation to manufacture of final products or for any other purpose, within the factory of production."

8. The word "factory" has been defined in the Central Excise Act at Section 2(e), which reads as under:

"factory" means any premises, including the precincts thereof, wherein or in any part of which excisable goods other than salt are manufactured, or wherein or in any part of which any manufacturing process connected with the production of these goods is being carried on or is ordinarily carried on".

It is an inclusive definition. For the purpose of Central Excise Act, a ''factory'' means more than one premises.

9. Rule 6 of the Cenvat Credit Rules, 2004 reads under:

"Obligation of manufacturer of dutiable and exempted goods and provider of taxable and exempted services:

(i) The Cenvat credit shall not be allowed on such quantity of input or input service which is used in the manufacture of exempted goods or exempted services, except in the circumstances mentioned in sub-rule (2)"

Sub-rule (2) - Where a manufacturer or provider of output service avail Cenvat credit in respect of any inputs or input services, [* * * *], and manufactures such final products or provides such output service which are chargeable to duty or tax as well as exempted goods or services, then, the manufacturer or provider of output service shall maintain separate accounts for receipt, consumption and inventory of input and input service meant for use in the manufacture of dutiable final products or in providing output service and the quantity of input meant for use in the manufacture of exempted goods or services and take Cenvat credit only on that quantity of input or input service which is intended for use in the manufacture of dutiable goods or in providing output service on which Service Tax is payable.

10. The aforesaid provision makes it clear that the CENVAT Credit shall not be allowed on such quantity of goods which is used in the manufacture of exempted goods. However, exception is carved out in sub-rule (2). Sub-rule (2) of Rule 6 provides - where a manufacturer or provider of output service avails CENVAT Credit in respect of any inputs except the input intended to be used as fuel and manufactures such final products or provides such output service which are chargeable to duty or tax as well as exempted goods or services, then, an obligation is cast on the assessee to maintain separate accounts for receipt, consumption and inventory or input and input service meant for use in the manufacture of dutiable final products or in providing output service and the quantity of input meant for use in the manufacture of exempted goods or services. However he would be entitled to CENVAT credit only on that quantity of input or input service which is intended for use in the manufacture of dutiable goods. Therefore, it is clear that the assessee manufacturer is entitled to CENVAT Credit on "inputs" which is used in the manufacture of dutiable goods.

11. In view of clear language in the statutory provisions coupled with the fact that the factory includes more than one premises to be eligible for CENVAT Credit, an assessee has to use the input in the manufacture of dutiable goods in his factory. If the factory includes more than one unit and if the assessee uses this input in the manufacturing of excisable goods in both the units, he would be

entitled to CENVAT Credit.

12. The Apex Court in Vikram Cement (supra) case has held as under:

"It appears to us on a plain reading of the clause that the phrase "within the factory of production" means only such generation of electricity or steam which is used within the factory would qualify as an intermediate product. The utilization of inputs in the generation of steam or electricity not being qualified by the phrase "within the factory of production" could be outside the factory. Therefore, whatever goes into generation of electricity or steam which is used within the factory would be an input for the purposes of obtaining credit on the duty payable thereon."

13. The Apex Court in Maruti Suzuki Ltd., (supra) case, held as under:

"To sum up, we hold that the definition of "input" brings within its fold, inputs used for generation of electricity or steam, provided such electricity or steam is used within the factory of production for manufacture of final products or for any other purpose. The important point to be noted is that, in the present case, excess electricity has been cleared by the assessee at the agreed rate from time to time in favour of its joint ventures, vendors, etc., for a price and has also cleared such electricity in favour of the grid for distribution. To that extent, in our view, assessee was not entitled to CENVAT credit. In short, assessee is entitled to credit on the eligible inputs utilized in the generation of electricity to the extent to which they are using the produced electricity within their factory (for captive consumption). They are not entitled to CENVAT credit to the extent of the excess electricity cleared at the contractual rates in favour of the joint ventures, vendors, etc., which is sold at a price."

14. From the aforesaid decision, it is clear that the definition of ''input'' brings within its fold the inputs used for generation of electricity or steam, provided such electricity or steam is used within the factory of production for manufacture of final products or for any other purpose. Therefore, it follows the term "within the factory of production" cannot be confined to a single unit. In view of the definition of factory in the act which means more than one premises, it has to be construed as the factory owned by the assessee. If the assessee owns more than one unit, all the units if they are situated at a place would constitute "a factory". If the electricity or steam generated within the factory of production means within the factory premises which may include more than one unit. If such electricity or steam generated within the factory of production is utilized by the assessee in more than one unit and if those units are manufacturing excisable goods, then, the assessee would be entitled to the benefit of CENVAT credit to the entire extent of utilization of such electricity or steam in all the units of its factory premises. Therefore, whatever goes into generation of electricity or steam which is placed within the factory which may consists of more than one unit would be an input for the purposes of obtaining credit on the duty payable thereon.

15. In the instant case, the assessee is having two units; one DTA unit and another EOU unit. Both are situated in the same factory premises. Both are manufacturing excisable goods. The assessee has purchased furnace oil from which, the steam is generated within the said factory premises. The said steam is utilized by the assessee in manufacturing excisable goods in both the units which are situated within the same compound, which falls within the definition of the word "factory" and therefore, the assessee is entitled to CENVAT credit in respect of entire volume of steam used in the manufacture of excisable goods by both the units. That is precisely what the appellate authorities have held and granted relief to the assessee. In that view of the matter, the question of law framed in this appeal is answered in favour of the assessee and against the Revenue. Accordingly, the appeal is dismissed. No costs.

