(2006) 07 P&H CK 0055

In the Punjab And Haryana At Chandigarh

Commr. of C. Ex. APPELLANT

Vs

Jai Forgings and Stamping (P) Ltd. RESPONDENT

Date of Decision : 11-07-2006

Acts Referred:
Central Excises and Salt Act, 1944 — Section 35H

Citation : (2008) 11 STR 423

Hon'ble Judges : Rajesh Bindal, J;Adarsh Kumar Goel, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. The revenue has approached this Court by filing the present petition u/s 35H(1 of the Central Excise Act, 1944 (for short ''the Act'') seeking a direction to the Custom, Excise and Gold (Control) Appellate Tribunal (for short ''the Tribunal'') (now known as Central Excise and Service Tax Appellate Tribunal) arising out of Final Order No. A/752/99-NB, dated 3-8-1999 to refer the following question of law to this Court for opinion:

Whether in the facts and circumstances of this case the Appellate Tribunal is correct in holding that the electrical transformer is capital goods as defined under Rule 57Q of the Central Excise Rules, 1944, particularly when these are general purpose electrical items prior to 16-3-1995?

2. We have heard counsel for the parties.

3. The present petition is delayed of 69 days for which an application of condonation of delay has been filed. However, we thought it appropriate to deal with the case on merit first.

4. Brief facts of the case are that the assessee in the present case, who is registered with the Department, availed Modvat credit of Rs. 26,100/- under Rule 57Q of the Central Excise Rules, on account of purchase of duty paid capital goods i.e. electrical transformers falling under heading No. 8504. Finding that the

assessee had wrongly entered the Modvat credit in its RG 23 C Part II, the electrical transformer not being covered under the Scheme for availing Modvat credit, the adjudicating authority issued show cause notice. The assessee controverted the allegation in the show cause, inter alia, submitting that even prior to the issuance of Notification No. 11/95-C.E. (N.T.), dated 16-3-1995 "Capital Goods" which were used in manufacturing of final products were eligible for Modvat credit in terms of Rule 57Q and 57T of the Rules and that the term "Capital Goods" is quite wide to include electrical transformer therein. Rejecting the contention of the assessee, the Assistant, Commissioner Central Excise disallowed Modvat credit of Rs. 26,100/- vide order dated 25-9-1995.

5. The assessee preferred an appeal against the above order before the Commissioner of Central Excise (Appeals) [for short ''CCE (A)''], who relying upon an earlier judgment of the Tribunal in 1996 (86) ELT 501 held that the transformers are eligible for Modvat credit being capital goods even before 16-3-1995. Even though the amount involved in the case was small still the Revenue went in appeal before the Tribunal, who vide its order dated 3-8-1999 rejected the appeal. Thereafter, the Revenue filed a refer ence application before the Tribunal, which was rejected as not maintainable vide order dated October 6, 2000. Revenue still being run satisfied, filed present peti tion before this Court.

6. Rule 57Q of the Rules, which was applicable at the relevant time, reads as under:

57Q. Applicability. - (1) The provisions of this section shall apply to finished excisable goods of the description specified in the Annexure below (hereinafter referred to as the "Final products") for the purpose of allowing credit of specified duty paid on the capital goods used by the manufacturer in his factory and for utilising the credit so allowed towards payment of duty of excise leviable on the final products, or as the case may be, on such capital goods, if such capital goods have been permitted to be cleared under rule 57S, subject to the provisions of this section and the conditions and restrictions as the Central Government may specify in this behalf:

Provided that credit of specified duty in respect of any capital goods produced or manufactured --

(a) in a free trade zone and used for the manufacture of final products in any other place in India; or

(b) by a hundred per cent export-oriented undertaking or by a unit in an Electronic Hardware Technology Park or by a unit in Software Technology Park and used for the manufacture of final products in any place in India,

shall be restricted to the extent of duty which is equal to the additional duty leviable on like goods u/s 3 of the Customs Tariff Act, 1975 (51 of 1975) equivalent to the duty of excise paid on such capital goods.

Explanation. - For the purpose of this section.--

(1) "capital goods" means--

(a) machines, machinery, plant, equipment, apparatus, tools or appliances used for producing or processing of any goods or for brining about any change in any substance for the manufacture of final products;

(b) components, spare parts and accessories of the aforesaid machines, machinery, plant, equipment, apparatus, tools or appliances used for aforesaid purpose; and

(c) moulds and dies, generating sets and weigh bridges used in the factory of the manufacturer.

7. A bare perusal of the definition of "capital goods" given in the Rules shows that the same is quite wide and liberal.

8. In our view the issue raised in the petition is squarely covered by the judgment of Hon''ble the Supreme Court in Commissioner of Central Excise Coimbatore and Others Vs. Jawahar Mills Ltd. and Others, , wherein considering Rule 57Q of the Rules, it was held as under:

4. The aforesaid definition of "capital goods" is very wide. Capital goods can be machines, machinery, plant, equipment, apparatus, tools or appliances. Any of these goods if used for producing or processing of any goods or for bringing about any change in any substance for the manufacture of final product would be "capital goods", and, therefore, qualify for availing MODVAT credit. Per Clause (b), the components, spare parts and accessories of the goods mentioned in Clause (a) used for the purposes enumerated therein would also be "capital goods" and qualify for MODVAT credit entitlement. Clause (c) makes moulds and dies, generating sets and weighbridges used in the factory of the manufacturers as capital goods and thus qualify for availing MODVAT credit. The goods enumerated in Clause (c) need not be used for producing the final product or used in the process of any goods for the manufacture of final product or used for brining about any change in any substance for the manufacture of final product and the only requirement is that the same should be used in the factory of the manufacturer. Thus, it can be seen that the language used in the Explanation is very liberal.

9. Further a Division Bench of this Court while considering as to whether the generating set is part of machinery or not, in Commissioner of Income Tax Vs. Saraswati Industrial Syndicate Ltd., held as under:

Having considered the submissions made by learned Counsel, we agree with Shri Mittal that no question of law arises for adjudication in this case. In his order, the Commissioner of Income Tax (Appeals) held that the generating set cannot be treated as independent of the whole concern and that the extra shift allowance should be granted by taking entire concern as one unit. This view of the Commissioner (Appeals) has been affirmed by the Tribunal and we do not find any reason to take a different view. Learned counsel for the Revenue could not show as to how the generating set is not a part of the plant and machinery and how it could be used independently for the purpose of carrying manufacturing process. Thus, we do not find any reason to entertain the application filed by the Revenue for directing the Tribunal to make reference of the question of law framed by it.

10. The assessee herein is engaged in the business of manufacturing of excisable goods which are covered under the Chapter 7303 of the Central Excise Tariff Act, 1985 (5 of 1986).

11. It could not be disputed before us that for manufacturing of these goods supply of power is one of the basic needs and without the supply of power it is not possible to carry out manufacturing activity. So only possible conclusion is that the electrical transformer used by the assessee is part of plant and machinery, used for bringing about change in substance for the manufacture of final products. In view of our above discussion, we do not find any merit in the arguments raised by the counsel for the Revenue that the electrical transformers will not fall in the category of capital goods as per Rule 57Q of the Rules. Accordingly, the petition is dismissed.

12. In view of our above findings, we do not deem proper to deal with application for condonation of delay.

13. Before parting with the order, we are constrained to record our displeasure in the manner in which the officers of the petitioner department are conducting this case, which involved a sum of Rs. 26,100/-. The Revenue must have spent more than the duty as expenses and professional fees besides spending huge amount of man hours at various levels for dealing with the filing of petitions and visiting different places in connection with this case, which is covered against the Revenue. The manner in which this case has been conducted by the Revenue leaves a very bad impression.

14. As is evident from application for condonation of delay, after the receipt of the order of the Tribunal, following steps were taken. The relevant details thereof contained in application are extracted below:

2. That in the present case in hand the order of the Id. CEGAT dated 6-10-2000 was received by the office of the petitioner on 1-11-2000. Thereafter the necessary approval was obtained for filing the reference petition in the Hon''ble High Court at Delhi. The records of the case were not sent to the office of the Additional Legal Advisor, New Delhi for filing the reference petition. The same were received by the office of Additional Legal Advisor, New Delhi on 7-12-2000.

3. That the Additional Legal Advisor, New Delhi further marked the case to Ms. Geeta Luthra, CGSC for filing the reference petition on 12-12-2000.

4. That the Reference Petition was filed in the Hon''ble High Court at Delhi vide filing no. 9 dated 3-1-2001. It is pertinent to mention here that the reference petition was filed within a period of limitation i.e. within 180 days.

5. That the reference petition was returned by the registry of the Hon''ble High Court with certain objections and again it was re-filed on 15-3-2001.

6. That on 13-10-2001 letter was sent by the department to the Govt. Counsel with a request to inform the latest position about the reference application. But no reply was received.

7. That the Divisional office was in constant touch with the Govt. Counsel at Delhi.

8. That ultimately the Govt. Counsel informed the department about the objections raised by the registry vide its letter dated 16-4-2003. The letter was addressed to the Divisional office, Central Excise, Yamuna Nagar.

9. That the Divisional office, Central Excise, Yamuna Nagar vide its letter dated 6-5-2003 informed the office of the Commissioner, Central Excise Commissionerate at Panchkula that the requirements at S. Nos. 1, 2 & 4 have been completed at their level. Now only the affidavit duly signed by the Commissioner is required to be sent to the Govt. Counsel at Delhi.

10. That the affidavit duly signed by the Commissioner, Central Excise Commissionerate, Panchkula was forwarded to the Divisional office, Central Excise, Yamuna Nagar on 7-5-2003 through its representative.

11. That on 18-6-2003 letter was sent to Govt. Counsel to inform the latest position of the case and date of filing of Reference Application. But no reply was received.

12. That on the part of the applicants all the requirements/formalities as desired by the Govt. Counsel were completed in all respects.

13. That the letter dated 1-4-2004 was received from the office of Govt. Counsel addressed to the Divisional office Central Excise, Panchkula. In the said letter it was mentioned that the reference petition filed in the Hon''ble Delhi High Court are to be in fact adjudicated by Hon''ble Punjab and Haryana High Court at Chandigarh as per High Court''s decision in the matter of Commissioner of Central Excise III v. Haryana Acrylic Co. (P) Ltd. (2001) and more recently in Commissioner of C. Ex., Delhi-III Vs. Enkay HWS India Ltd., .

14. That the letter dated 1-4-2004 was received by the Divisional office Central Excise, Yamuna Nagar on 5-4-2004. The Divisional office further brought all these facts to the notice of the Commissionerate at Panchkula vide letter dated 13-4-2004.

15. That the letter dated 13-4-2004 was received by the Commissionerate office on 20-4-2004. The Commissioner vide its letter dated 21-4-2004 directed the Assistant Commissioner, Central Excise, Yamuna Nagar to immediately depute the officer to collect the records from the Govt. Counsel at Delhi.

16. That the officer from the Divisional office, Yamuna Nagar contacted the Govt.

Counsel at Delhi on 26-4-2004 and the Govt. Counsel handed over the records vide its letter dated 26-4-2004.

17. That the Divisional office, Central Excise, Yamuna Nagar further got the approval for filing the reference petition before the Court of Competent Jurisdiction i.e. Hon''ble Punjab and Haryana High Court at Chandigarh.

18. That after completing all the formalities the case file alongwith all the records i.e. including the records received from the office of Govt. Counsel at Delhi were sent to the Commissionerate office at Panchkula for further necessary action in the matter. The same was sent vide letter dated 17-5-2004 and the same was received in the Commissionerate office on 18-5-2004.

19. That the Govt. Counsel at Chandigarh was requested for filing the reference petition. All the records pertaining to the above mentioned case were handed over to the office of Govt. Counsel on 18-5-2004.

20. That accordingly the reference petition was prepared by the Additional Central Govt. Standing Counsel and filed in this Hon''ble High Court on 21-5-2004.

21. That it is submitted that the delay in the case is unavoidable due to procedure in obtaining sanction, approval and study of papers by various branches of the petitioner''s department. Not only this in the present case was filed before the Hon''ble High Court at Delhi and ultimately the same was returned by the Govt. Counsel at Delhi for filing it in this Hon''ble High Court. The advice by the Govt. Counsel was tendered on the basis of judgment rendered by Hon''ble Delhi High Court. It is pertinent to mention here that so far as the Haryana region is concerned the head office of the Commissioner ate was situated at Delhi and for that reason earlier the cases were filed before the Hon''ble High Court at Delhi.

15. In view of above facts, we direct that a copy of this order be sent to the Chairman, Central Board of Excise and Customs, New Delhi, so that appropriate remedial measures are taken.

