(2016) 06 MAD CK 0089

In the Madras High Court

Case No : C.M.A. No. 467 of 2010

Commr. of C. Ex. & S.T., LTU, Chennai — APPELLANT

Vs

EID Parry (India) Ltd. — RESPONDENT

Date of Decision : 20-06-2016

Acts Referred:

Citation : (2016) 338 ELT 359

Hon'ble Judges : S. Manikumar and D. Krishnakumar, JJ.

Bench : Division Bench

Advocate : Shri A.P. Srinivas, SSC, for the Appellant; Shri S. Muthuvenkataraman, Advocate, for the Respondent

Final Decision : Allowed

Judgement

D. Krishnakumar, J.—This Civil Miscellaneous Appeal arises against the Final Order No. 219/2009, dated 13-2-2009 on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

2. Mr. A.P. Srinivas, learned Senior Standing Counsel for the appellant would submit that the respondent M/s. EID Parry are manufacturers of sugar and molasses falling under Chapter 17 of the First Schedule to the Central Excise Tariff Act, 1985. The respondents have installed a captive power plant or co-generation plant in their sugar factory located at Kurumbur, Aranthangi Taluk, Pudukottai District. The respondents have availed credit of duty paid on the components and accessories used for setting up the co-generation plant in terms of the Cenvat Credit Rules, 2004. Subsequently, show cause notice in C. No. V/Ch.17/15/29/2006-Cx.Adj., dated 25-9-2016 was served on the respondent stating that the respondents have availed Cenvat credit of the duty paid on the Machineries, Components and other accessories to the tune of Rs. 7,07,18,265/- (Cenvat Credit Rs. 6,93,34,723/- and Education Cess Rs. 13,83,542/-) used in installing the Captive Power Plant and Captive Power Plant is a Turnkey project. The Turnkey projects are not excisable goods and they are not goods conforming to the description of any machinery which falls in the Chapters mentioned in Rule

2(a)(A)(i) of Cenvat Credit Rules, 2004. Inasmuch as the power plant is not goods and does not fall under any of the Specific Chapter Headings mentioned in Rule 2(a)(A)(i) ibid, the inputs used for installing the Power Plant are also not covered within the ambit of Rule (2)(A)(iii) of Cenvat Credit Rules, 2004. Assessee have contravened the provisions of Rule 3 of the Cenvat Credit Rules, 2004 inasmuch as they have wrongly availed the credit of duty paid on the components, accessories, equipments and spares of the "Captive Power Plant" which are not falling under any of the Chapter Headings specified in Rule 2(a)(A)(i) and (iii) of the Rules.

3. The Assessee submitted his reply dated 30-10-2006 and 21-8-2007 to the Assessing Authority stating that the various component machineries which are brought into the factory are by themselves capital goods as they individually fall under the chapter heading specified in the definition of capital goods and that the subject goods are used within the factory of production and they have not contravened Rule 6(1) and 6(4) of CCR, 2004 inasmuch as their final products are sugar and molasses which are dutiable and not electricity as alleged in the show cause notice and that the electricity is not to be treated as exempted goods as neither any exemption is available for electricity nor the same is specified at Nil duty in the tariff and thus Rule 6 of CCR, 2004 is not at all applicable in the present scenario and that invocation of Rule 6(4) of CCR, 2004 is not correct as the captive power plant is not used exclusively in the manufacture of electricity but only within the factory in the manufacture of sugar and molasses barring the fact that some quantity of electricity is given to TNEB Grid. Personal hearing was given to the respondent.

4. The Commissioner of Central Excise considered the objections of the respondent and passed by the following order by Order No. 22/2007, dated 25-9-2007 :-

"Order

(i) I confirm the demand of Rs. 7,11,18,829 (Seven Crore Eleven Lakh Eighteen Thousand Eight Hundred and Twenty Nine only)—Cenvat Credit Rs. 6,97,27,436/- and Education Cess Rs. 13,91,393/-) being the amount of wrong Cenvat Credit taken on the component parts used in installing the Captive Power Plant during the period from September, 2005 to March, 2007 under Section 11A of Central Excise Act, 1944, read with Rule 14 of the Cenvat Credit Rules, 2004.

(ii) I order that interest at the appropriate rate on the amount confirmed against Sl. No. (i) above is liable to be recovered under Section 11AB of Central Excise Act, 1944 read with Rule 14 of Cenvat Credit Rules, 2004.

(iii) I impose a penalty of Rs. 7,11,18,829 (Seven Crore Eleven Lakh Eighteen Thousand Eight Hundred and Twenty Nine only) on the assessee under Rule 15 of Cenvat Credit Rules, 2004 for wrongly taking the credit of duty paid on the goods which are used for installing the Captive Power Plant."

5. Aggrieved by the aforesaid order, the assessee had preferred the Appeal before the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai. The Tribunal considered the detail order passed by the Commissioner of Central Excise by relying upon the decision of the Tribunal passed by the Mumbai Bench and allowed the Appeal filed by the assessee/ respondent herein.

6. Aggrieved by the aforesaid Appeal, the Revenue has preferred the present Civil Miscellaneous Appeal. At the time of admission of the Appeal, the following substantial questions of law were formulated for consideration :-

(i) Whether the Tribunal was right in allowing credit for the entire co-generation plant without examining the eligibility or otherwise of the individual items?

(ii) Whether the Tribunal was right in permitting credit on items such as angles, beams, channels, ladder trays, joists supporting structures, steel structures which are neither "inputs" nor "capital goods" as per the definition especially in the light of the decision rendered by the Principal Bench of CESTAT, New Delhi reported in 2008 (230) E.L.T. 169?

7. Mr. A.P. Srinivas, learned Senior Standing Counsel for the appellant would submit that the Tribunal has failed to consider the case of the Revenue and proceeded on the basis that the credit of duty paid has been wrongly denied by the Commissioner and by placing reliance on the decision in Tata Engineering and Locomotive Co. Ltd. v. Commissioner of Central Excise, Pune-I reported in 2005 (191) E.L.T. 209 (Tri.-Mumbai), allowed the appeal preferred by the respondent. The Tribunal has not considered the matter while allowing the appeal with reference to in allowing credit for the entire co-generation plant, without examining the eligibility of the individual items of capital goods for taking Cenvat Credit as per CCR, 2004. The Tribunal has simply followed the earlier order passed by the Tribunal and granted relief without discussing the eligibility of individual items involved in the Appeal. Therefore, to meet the interest of justice, the Appeal has to be allowed and remanded to the CESTAT.

8. The learned counsel for the respondent submitted that in the event of allowing the appeal, the matter may be remanded to the adjudicating authority, to consider afresh.

9. The Learned counsel for both parties submitted that even if the matter is remanded to the Tribunal, the issue requires a fresh look by the adjudicating authority and therefore, while assailing the correctness of the order impugned, this Court can consider the above said submission.

10. Placing on record the above submissions and on the facts and circumstances of the case, we are of the view that the matter requires fresh adjudication and for the above said purpose, while setting aside the order passed in Appeal namely, E. Appeal No. 185/2007, in Final Order No. 219/2009, dated 3-3-2009 by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench,

Chennai, we direct that the matter is remanded to the Commissioner of Central Excise, Chennai (original adjudicating authority), to consider the issue afresh, in accordance with the provisions of the statute. Substantial questions of law extracted supra are answered in the affirmative in favour of the appellant.

11. The Civil Miscellaneous Appeal is allowed, with the above direction. No costs.