(2014) 08 UK CK 0018

In the Uttarakhand High Court

Case No : Central Excise Appeal Nos. 2 and 6 of 2010

Commr of Cus. & C. Excise — APPELLANT

Vs

Bazpur Cooperative Sugar Factory Ltd. — RESPONDENT

Date of Decision : 26-08-2014

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

Citation : (2015) 316 ELT 72 : (2015) 30 GSTR 460

Hon'ble Judges : K.M. Joseph, C.J;Sudhanshu Dhulia, J

Bench : Division Bench

Advocate : Shobhit Saharia, Advocates for the Appellant; Puja Banga, Advocates for the Respondent

Judgement

K.M. Joseph, C.J.—These appeals being interconnected, we are disposing of the same by this common judgment. We treat Central Excise Appeal No. 2 of 2010 as the leading case. These appeals are maintained under Section 35G of the Central Excise Act. The following is the substantial question of law:

"Whether Cenvat credit attributable to the quantity of Inputs (Molasses) used in, or in relation to manufacture of exempted final product (Rectified Spirit, attracting nil rate of duty and which was reported as wastage/storage loss) should not be reversed as per provisions of para (a)(i) of sub-rule (3) of Rule 6 of Cenvat Credit Rules, 2004?"

2. Appellant calls in question the final order passed by Customs, Excise and Service Tax Appellate Tribunal. Respondent Bazpur Cooperative Sugar Factory Limited has two plants situated in the same factory premises. It has a sugar mill and a distillery unit. In the sugar mill, it manufactures Vacuum Pan Sugar and Molasses out of sugarcane. In the distillery unit, it is mainly manufacturing alcoholic liquor for human consumption, namely, country spirit and Indian made foreign liquor. It also manufactures rectified spirit and denatured spirit. Rectified spirit attracts NIL rate of duty and denatured spirit attracts 16 per cent ad valorem. Molasses is the only input used for manufacturing of the commodities in

the distillery unit. Till April, 2003, respondent has not taken credit on molasses. It was noticed, however, from the month of May, 2003, the respondent started availing credit on molasses in the distillery unit. It is found that it took credit on molasses received since January, 2003 and used the same towards payment of duty. While scrutinizing the return of the party for the months July, 2005 to March, 2006, it was observed that the stock of rectified spirit was short by 33172.80 Bulk Litres. It was shown as wastage. The rectified spirit, being an excisable commodity, Cenvat credit involved on the quantity of rectified spirit lost/ cleared as wastage, according to the Department, should have been reversed by the party immediately. Accordingly, the party was required to reverse the Cenvat credit of Rs. 1,24,398/- and Education Cess of Rs. 2,488/- involved on the quantity of 33172.80 Bulk Litres of rectified spirit. On the failure to do so, a show cause was issued, to which the party gave its reply. The Authority directed, vide its order, to reverse the Cenvat credit of Rs. 1,24,398/- and penalty was also levied. Besides interest was also levied. Feeling aggrieved, the party carried the matter in appeal. Similar order was passed for another period, which is the subject matter of the other appeal. In appeal, the impugned order was confirmed. It was in further appeal by the respondent that the Tribunal interfered with the matter by the impugned order and, hence, the appeals.

3. We have heard Mr. Shobhit Saharia, learned Counsel for the appellant and Ms. Puja Banga, learned Counsel for the respondent.

4. It is necessary to notice the reasoning of the Tribunal. Relevant paras 4 to 6 are being reproduced as under:

"4. After hearing both the sides and on perusal of the records, there is no dispute that the duty paid inputs used in the manufacture of exempted goods viz. Rectified Spirit. It is also a fact that the Rectified Spirit evaporated during storage at the appellants'' premises. The Commissioner (Appeals) observed that the basic principle of Cenvat Credit Rules is admissibility of credit on inputs for the manufacture of goods, which are dutiable and not for the clearances of goods. The contention of the appellant is that the loss is 0.4%, which is within the permissible limit as settled by the State Excise Authority. Find that the Tribunal in the appellants own case for earlier period in the case of Bazpur Cooperative Sugar Factory Ltd. (supra) allowed the appeal.

5. The relevant portion of the findings of the Tribunal in the case of Bazpur Cooperative Sugar Factory Ltd. (supra) is reproduced below:-

7. It is true that there is no express provision in the Central Excise Act, or the Rules made thereunder, nor is there any circular of the Board, as in the case of molasses, under which the assessee can claim remission on the quantity lost in the case of rectified spirit. In fact, had there been any specific provision, one way or the other, there would be no difficulty in accepting or rejecting the claim of the appellant at the threshold. However, the fact that there is no provision does not mean the appellant''s claim is to be rejected outright.

8. One cannot lose sight of the volatile nature of rectified spirit. It is not difficult to visualize that in whatsoever manner it may be stored, some loss is bound to occur as a result of natural causes having regard to the nature of the goods. If it is a fact that under the State Excise Law storage loss up to 0.5% is allowed, that can be taken to be a safe basis for allowing a similar benefit under the Central Excise Law as well. Dealing with the same goods i.e. rectified spirit, a learned Single Member of this Tribunal in Shree Siddheshwar SSK Limited (supra) observed as under:

"It is noticed that in this particular case both the raw materials and the finished goods in question are susceptible to losses in storage and the losses recorded are reportedly within the permissible norms of the State Excise authorities. The losses in storage of the finished products, namely, rectified spirit are in the nature of invisible losses. When the finished product is lost in visible form due to natural cause naturally the ingredients also gets lost. The company invoices their final products taking into account such invisible losses. The reasoning adopted by the Commissioner (Appeals) in granting relief to the assessee is acceptable and her order is not required to be interfered with."

9. *** *** ***

10. It would thus appear that the cases relied upon by the Revenue were decided in different factual background and the decisions lend no help to the Revenue. On the other hand, the case of Ajinkyatara SSK Ltd. related to loss of rectified spirit itself. I am in respectful agreement in the reasoning of the learned Member. I am also of the view that having regard to the nature of the goods i.e. rectified spirit, some loss of quality is bound to occur as a natural phenomenon. The case of the appellant that it was entitled to count the loss 42,524.9 BL spirit as wastage was in accordance with law and the authorities below committed error in rejecting the same, and the impugned orders so far as they relate to utilization of credit of Rs. 1,06,312/- involved in the clearance of 42,524.9 BL rectified spirit are accordingly set aside.

6. It is seen that the Tribunal consistently observed that the losses of Rectified Spirit in storage are natural losses and credit cannot be denied within the permissible limit of 0.5% as settled by the State Excise Department. In the present case, credit was denied on loss of 0.4%."

5. The learned Counsel for the appellant would submit that the Tribunal has clearly erred in applying on the practice under the State Excise laws in the matter of making allowance for the wastage. He would remind us that the case arose under the Cenvat Credit Rules. He would submit that, as far as the rectified spirit is concerned, it attracts NIL duty. He would further draw our attention to the definition of "exempted goods" under the Central Excise Act and would emphasize that exempted goods include NIL rated goods. Therefore, the result is rectified spirit manufactured by the respondent was exempted goods. Next, he drew our attention to Rule 6 of the Cenvat Credit Rules, 2004, as it stood then. It

reads as follows:

"(1) The Cenvat credit shall not be allowed on such quantity of inputs which are used in the manufacture of exempted goods, except in the circumstances mentioned in sub-rule (2).

(2) Where a manufacturer avails Cenvat credit in respect of any inputs, except inputs intended to be used as fuel, and manufactures such final products which are chargeable to duty as well as exempted goods, then, the manufacturer shall maintain separate accounts for receipt, consumption and inventory of inputs meant for use in the manufacture of dutiable final products and the quantity of inputs meant for use in the manufacture of exempted goods and take Cenvat credit only on that quantity of inputs which is intended for use in the manufacture of dutiable goods.

(3) The manufacturer, opting not to maintain separate accounts shall follow conditions, as applicable to him, namely-

(i) goods falling within Heading 22.04 of the first schedule to the tariff act;

(ii)

(iii)

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(viii)

The manufacturer shall pay an amount equivalent to the Cenvat credit attributable to inputs used in, or in relation to the manufacture of such final products at the time of their clearance from the factory."

6. He would, therefore, submit that the point of controversy actually arose with reference to the argument of the respondent that the reversal of credit is contemplated under Rule 6(3) only at the stage when the goods are actually cleared. According to him, the case of the respondent that, unless the goods are cleared, there will be no liability to reverse the credit, cannot be accepted. He would submit that the soul of the Cenvat credit is that, in order to avoid cascading effect of duties, where the final product is dutiable, any duty which is paid on the raw materials or intermediary products, credit can be availed for payment of the duty payable on the final product. But the fundamental essence is that the final product is dutiable. When the final product is, itself, not dutiable and the raw material, which is duty paid, is used for the manufacture of such product, the assessee is bound to reverse the credit. It matters little that, after the manufacture, there is wastage or loss. It matters little that whether, after the manufacture, it reaches the factory gate and it is cleared. What is important is that manufacture took place. If manufacture of final product, which is not dutiable, takes place with the aid of raw material, which is duty paid, then the

respondent cannot claim the benefit of Cenvat credit.

7. Per contra, the learned Counsel for the respondent would, first of all, point out that the Court may refuse to consider these appeals on merits. This is for the reason that the orders were passed by the Tribunal for three different periods. The Department, though filed an appeal against the order of the Tribunal, being CEXA No. 5 of 2008, in respect of one of the periods, wherein common question arose, it did not pursue the matter and it is dismissed in default. Next, she would support the order of the Tribunal. The learned Counsel for the respondent, understandably relying on the provisions contained in Rule 6(3), would submit that, unless there is actual clearance of the goods, there can be no question of reversal of credit and, therefore, would submit that the wastage, as found by the Tribunal, is only to be justified.

8. In regard to the contention of the learned Counsel for the respondent that in regard to one period (CEXA No. 5 of 2008), appeal was not pursued and the effect of the same; the learned Counsel for the appellant Mr. Shobhit Saharia would submit that it would not have the effect of debarring the consideration of the present appeals on merits. We found, in fact, the appeal has been dismissed and it was ordered to be restored on payment of Rs. 5,000/- as cost. According to the learned Counsel for the appellant, there is miscommunication. He would, in fact, invite our attention to the judgment of the Apex Court in the case of Commnr. of Central Excise, Raipur Vs. Hira Cement, . He would submit that, in that case also, one of the orders of the Commissioner was not challenged and effect of the same was dealt with as under:

"23. Before us, the parties have placed the entire facts. We may also place on record that it has been conceded before us by the learned Counsel appearing on behalf of the Respondent that the earlier order, dated 26-9-2001 shall not operate as a res-judicata but as noticed hereinbefore, the only contention raised was that once the Revenue accepts a judgment, it cannot raise the said question once again.

24. Although some decisions to this effect have been cited by Mr. Santhanan, we are of the opinion that the matter should be considered afresh by the Tribunal upon considering all aspects of the matter. We refrain ourselves from going into the said question. We may, however, notice that a Bench of this Court in Government of W.B. v. Tarun K. Roy stated: (SCC p. 358, paras 28-29)

"Non-filing of an appeal, in any event, would not be a ground for refusing to consider a matter on its own merits. (See State of Maharashtra v. Digambar.)

In State of Bihar v. Ramdeo Yadav wherein this Court noticed Debdas Kumar by holding: (SCC p. 494, para 4)

''4. Shri B.B. Singh, the learned Counsel for the appellants, contended that though an appeal against the earlier order of the High Court has not been filed, since larger public interest is involved in the interpretation given by the High

Court following its earlier judgment, the matter requires consideration by this Court. We find force in this contention. In the similar circumstances, this Court in State of Maharashtra v. Digambar and in State of W.B. v. Debdas Kumar had held that though an appeal was not filed against an earlier order, when public interest is involved in interpretation of law, the Court is entitled to go into the question.''"

9. Therefore, it is submitted that the Court may consider the matter on merits. We are also inclined to think that the fact that, for one period, the appeal was though filed and though the restoration was ordered on payment of cost and cost could not be paid and, therefore, the order rejecting the appeal holds good; but that should not bar the appellant from urging us to consider these appeals on merits.

10. The learned Counsel for the appellant argued that only the stage at which the reversal is to take place is when there is removal and the same is alone what is contemplated under Rule 6(3) and that does not mean that, if, after manufacture, there is wastage, the party will be able to get Cenvat credit.

11. As regards the merits of the matter, it may be true that the final goods, in this case rectified spirit, have been lost by evaporation. Here we are not concerned with the case under the State Excise law. Here, we are concerned specifically with the issue relating to availability of Cenvat credit under the Cenvat Credit Rules. The object of the rules appears to be, to avoid the cascading effect of duties at various stages and till the final product emerges, if duty is paid on the raw materials or on the intermediary products, credit could be taken for the same when it comes to payment of duty of the final product. Quite clearly, for working out the scheme, what the rule maker has provided is that the final product in respect of which Cenvat credit is claimed must be itself dutiable. Rectified spirit, as we have already noted, is not dutiable being assessable at NIL rate, which, by the Cenvat Credit Rules, is exempted. Being exempt the final product, respondent could not possibly have claimed Cenvat credit in respect of the same. We notice, in fact, the reasoning of the first appellate authority, wherein the issue has been culled out as under:

"The issue is not regarding condonation of losses in respect of final products on account of natural causes. The issue is whether credit in respect of inputs used for exempted goods is at all available or not and whether, in terms of option exercised by an assessee to take the credit at the time of receipt of inputs, whether the same is required to be reversed when the goods are made out of it do not exist. IO find that the appellant themselves agree that in case rectified spirit is cleared from the factory, the Cenvat credit is to be reversed as the goods are wholly exempted from payment of duty. Can there be a possibility that when exempted goods exist and are cleared, Cenvat is to be reversed but when the same are lost, the same credit is not to be reversed and can be used for payment of duty on other dutiable final products. An answer in affirmative seems to not only illegal but also absurd. In both the situations above, inputs have been used in the manufacture of exempted goods. Rectified spirit does not become dutiable goods, when it is lost due to natural or any other causes. The basic principle of Cenvat Credit Rules is admissibility of credit on inputs for the manufacture of goods which are dutiable and not for the clearances of goods. I, therefore, find that the contention of the appellant is not only against the rules but also against the will of the legislation. I, therefore, find no force in their contention and there appears to be no cause to interfere with the orders of the adjudicating authority."

12. We would think that the reasoning therein appears to us to be correct. Therefore, we would think that, under the scheme, when admittedly duty paid molasses have been used for the manufacture of rectified spirit for which a formula has been deployed by the authorities; we can proceed on the basis that a particular quantity of duty paid molasses is used for the manufacture of the final product, which, because it is not dutiable, respondent becomes disentitled to claim Cenvat credit on the same. In such circumstances, the direction, which is impugned by the respondent, namely, to reverse the credit and imposition of the penalty and the interest for the failure to do so, cannot be complained of. Merely because it is not cleared for the reason that it cannot be cleared does not mean that the manufacture did not take place. The credit standing to the account of duty paid molasses used for the purpose of producing the non-dutiable final product necessarily must be proportionately reduced. The danger of the party using it for other purposes as highlighted by the Commissioner cannot be overlooked by us. In such circumstances, we are inclined to allow the appeals. The question of law, which was framed in Central Excise Appeal No. 6 of 2010, we formulate the very same question of law in the other appeal also, which, by omission, is not specifically taken. Since common question arises, we formulate the said question of law there also and, therefore, we would answer the question by stating that, in the circumstances of these cases, when there is wastage, the reversal must take place in view of provision of Rule 6(1). Accordingly, the appeals are allowed and the impugned orders are set aside.