(2013) 01 MAD CK 0119

In the Madras High Court

Case No : Civil Miscellaneous Appeal (NPD) No. 1696 of 2005 and Civil Miscellaneous Petition No. 9471 of 2005

India Pistons Ltd. APPELLANT

Vs

Commissioner of Central Excise (Appeals) RESPONDENT

Date of Decision : 10-01-2013

Acts Referred:

Citation : (2013) 294 ELT 383 : (2013) 18 GSTR 600

Hon'ble Judges : R. Karuppiah, J;Chitra Venkataraman, J

Bench : Division Bench

Advocate : Krishna Srinivasan for S. Ramasubramaniam, for the Appellant; E. Vijayanand, for the Respondent

Judgement

Chitra Venkataraman, J.—This civil miscellaneous appeal, filed at the instance of the assessee, was admitted by this court on the following

substantial questions of law:

(i) Whether the CESTAT failed to see that the scheme of deemed credit on aluminium, which itself postulates the availment of credit by the

manufacturer without production of any duty-paying documents, is a departure from the normal Modvat Scheme and in such circumstances,

whether the appellant could be denied the benefit of Modvat on aluminium ingots received from a supplier, who has not claimed the benefit of any

exemption notification ?

(ii) Whether the CESTAT failed to see that in law and in facts there is a presumption that all stocks of aluminium lying in the country are duty paid,

such duty having been paid by the original manufacturer when the aluminium came into existence in the market for the first time ?

(iii) Whether the CESTAT was right in denying the Modvat credit to the appellant merely on the ground that they had received the same from the

supplier, who has not availed of the benefit of any exemption, whereas any other assessee, who even purchases the aluminium from a trader was

entitled to the benefit of the deemed credit and whether such a gross discrimination between availment of deemed credit on stocks procured from a

trader without duty-paying document and procuring the stocks from a supplier, who had not availed of the benefit of any exemption notification

was permissible ?

(iv) Whether the CESTAT was right in confirming the order of the lower authorities which had transgressed the order of remand dated February 2,

1996 passed by the larger Bench of the Tribunal ?

(v) Whether the CESTAT committed a fundamental error in disregarding the evidence given by the supplier himself, that they had not availed of the

benefit of any exemption notification, by placing a most untenable interpretation that the evidence of the supplier was not ''gospel truth'' that too in

the absence of any cross-examination by the Department ?

(vi) Whether the order of the CESTAT committed a manifest error by going into issues which were not the subject-matter of the larger Bench''s

order of remand and in this connection whether the CESTAT failed to see that the order of remand of the larger Bench was a limited remand and

not an open remand?

It is seen from the facts that the appellant herein is a manufacturer of automobile pistons, gudgeon pins and piston rings from unwrought aluminium

alloy ingots, unwrought aluminium ingots, unwrought aluminium castings procured from smelters, who manufactured the same from the duty-paid

aluminium. The assessee availed of Modvat credit on imports such as aluminium ingots, aluminium castings, aluminium alloy ingots, etc., in terms of

sub-rule (2) of rule 57G of the Central Excise Rules, 1944.

2. It was noticed that during the period March 1, 1988 to September 12, 1998, the appellant/assessee had availed of deemed credit to the extent

of Rs. 10,37,337.48 on aluminium alloy ingots. As per the Government Order F. No. 342/1/88-TRV, dated May 20, 1988, deemed credit was

not available on aluminium alloy ingots, if such ingots were recognisable as being non-duty paid or wholly exempted from duty or charged to nil rate of duty. It was pointed out that the aluminium alloy ingots were manufactured by the manufacturer out of the duty-paid unwrought aluminium

falling under Chapter 76 and were exempted vide Notification No. 100/1988. Thus, the assessee was not eligible for deemed credit for the above

said inputs from March 1, 1988. On appeal, the Collector (Appeals), allowed the claim of the assessee, holding that the exemption under the

notification was only conditional and there was no evidence from the side of the Revenue to show that the aluminium ingots were manufactured out

of non-duty-paid goods. Thus, by the order dated December 15, 1989, the Collector set aside the order of the Assistant Collector dated March

3, 1989, holding that the assessee was entitled to avail of the deemed credit on the aluminium alloy ingots during the period March 1, 1988 to May

19, 1988, as there was no condition on payment of duty on the ingots as per F. No. 332/30/87/TRU, dated November 2, 1988 and hence

directed restoration of the credit. As regards the deemed credit from May 20, 1988, exemption under Notification No. 100/1988 was conditional

and yet, there was no evidence that the ingots were manufactured from out of non-duty-paid goods. Thus, for the period May 20, 1988 to

September 12, 1988, the matter was remanded for de novo enquiry.

3. Aggrieved by this, the Revenue went on appeal before the CEGAT that the letter issued by the supplier--Indica Metal Trading Company on

aluminium alloy ingots showed that what was cleared by them were non-duty-paid item only and hence, in the absence of evidence to show that

they were manufactured out of duty-paid aluminium, the benefit of the notification could not be granted. On its part, the assessee filed the cross-

objection and contended that in the light of the findings by the appellate authority, the relief should have been granted by the appellate authority

itself for the period from May 20, 1988 to September 12, 1988.

4. It is further seen from the records that for the period May 20, 1988 to September 12, 1988, on a fresh enquiry, once again, an order was

passed on May 10, 1994, negativing the claim of the assessee. This led to the filing of the appeal before the Collector.

5. The appeal filed by the Revenue for the period March 1, 1988 to May 19, 1988 before the Tribunal came up for consideration in the

meanwhile. Pointing out to Notification No. 100/1988, the Tribunal, in its Order

Nos. A/315 to 323/96-NB, dated February 2, 1996 in Appeal

No. E/190/90, held that the exemption was a conditional exemption. The question whether the manufacturer of the inputs satisfied the condition on

duty payment had to be investigated. If the manufacturer satisfied the condition and availed of the exemption, then the inputs had to be regarded as

wholly exempted from duty and as such, clearly recognisable as being non-duty paid or charged to nil rate of duty and the assessee would not be

entitled to deemed credit from March 1, 1988 to March 19, 1988 and May 20, 1988 to September 12, 1988. If the manufacturer did not avail of

any benefit of exemption, the assessee would be entitled to deemed credit. Thus, the Tribunal remanded the case and allowed the Department''s

appeal. Thus, following the said order, the first appellate authority once again remanded the matter for de novo enquiry.

6. Admittedly, in the remand proceedings before the Assistant Commissioner (Central Excise), the appellant had an opportunity of cross-examining

its supplier. In question No. 18, the appellant herein categorically asked its supplier as to whether it had availed of any exemption during the

relevant period. The supplier replied that it had not claimed any exemption on the aluminium ingots. In spite of such an information elicited from the

supplier, the adjudicating authority passed an order against the appellant herein, once again rejecting the claim, holding that the condition imposed

in Notification No. 100/1988, superseded by Notification No. 180/1988, thus governing the case, the goods are recognisable as being non-duty-

paid aluminium. Thus, the claim of the appellant was rejected.

7. Aggrieved by this, the appellant went on appeal before the Commissioner. Stating that the supplier had stated in their letter dated February 6,

1991 and February 7, 1991 that they were availing of the benefit of exemption under Notification No. 100/1988, superseded by Notification No.

180/ 1988, the Commissioner held that deemed credit was not available to the assessee. Aggrieved by this, the assessee went on appeal before

the CESTAT. The Tribunal rejected the case of the appellant herein on the ground that the adjudicating authority had given a finding that the

manufacturer of the inputs had satisfied the condition and availed of the exemption. The Tribunal found that whatever stated in the cross-

examination was not a gospel truth to be accepted without critical examination.

It further pointed out that there was no evidence that they had paid

duty and as the manufacturers were not entitled to exemption, they should have paid duty. Since the raw materials were non-duty paid, the

assessee was not entitled to deemed credit. In the circumstances, the claim of the appellant was rejected. Aggrieved by this, the present appeal has

been filed.

8. The learned counsel appearing for the appellant pointed out that in the course of the appeal proceedings, the Commissioner of Appeals pointed

out in paragraph 12 that from the case records, he found that the supplier himself has stated in letters dated February 6, 1991 and February 7,

1991 that they had availed of the exemption under Notification No. 100/1988, which was superseded by Notification No. 180/1988. According

to the learned counsel for the appellant, there are no such letters and nothing was available on record.

9. Considering the specific question raised as to the existence of these letters and the denial that there are no such letters, this court directed the

learned standing counsel to ascertain from the office of the Commissioner of Appeals as to the availability of these letters dated February'' 6, 1991

and February 7, 1991, addressed by the supplier. By the letter dated December 14, 2012, the Deputy Commissioner, addressed to the

Superintendent of Central Excise, Legal Section, Chennai II Commissionerate, and pointed out that the two letters are not available in the records

and the assessee is not in possession of the said letters.

10. Thus, in the face of the above information on the alleged letters written by the supplier, the very basis of the order suffers a serious illegality.

11. Under Notification No. 100/1988, dated March 1, 1988, unwrought aluminium ingots alloyed or not and castings were wholly exempt from

duty, if manufactured from goods falling under Chapter 76 or 83, if duty had been paid. The notification reads as under :

In exercise of the powers conferred by sub-rule (1) of rule 8 of the Central Excise Rules, 1944 and in supersession of the notification of the

Government of India in the Ministry of Finance (Department of Revenue) No. 183/1984-Central Excise, dated August 1, 1984, the Central

Government hereby exempts aluminium of the description specified in column 2 of the table hereto annexed and falling within Chapter 76 of the

Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), from so much of the duty of excise leviable thereon which is specified in the said

Schedule, as is in excess of the amount calculated at the rate specified in the corresponding entry in column 3 of the said table subject to the

condition, if any, laid down in the corresponding entry in column 4 thereof.

Provided that in respect of goods, mentioned against Sl. Nos. 1, 5, 6, 10 and 11 of the said table, the exemption shall not be applicable if they are

manufactured by producers who produce unwrought aluminium from bauxite or alumina or both, whether in the same factory or any factory in

India.

12. The said notification was superseded under Notification No. 180/1988, dated May 13, 1988, which reads as under:

In exercise of the powers conferred by sub-rule (1) of rule 8 of the Central Excise Rules, 1944 and in supersession of the notification of the

Government of India in the Ministry of Finance (Department of Revenue) No. 100/1988-Central Excise, dated March 1, 1988, the Central

Government hereby exempts goods of the description specified in column 3 of the table hereto annexed and falling under heading Nos. or sub-

heading Nos. of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), as are specified in the corresponding entry in column 2 of the

said table, from so much of the duty of excise leviable thereon which is specified in the said Schedule, as is in excess of the amount calculated at

the rate specified in the corresponding entry in column 4 of the said table subject to the condition, if any, laid down in the corresponding entry in

column thereof.

Provided that in respect of goods, mentioned against Sl. Nos. 1, 5, 6, 10 and 11 of the said table, the exemption shall not be applicable if they are

manufactured by producers who produce unwrought aluminium from bauxite or alumina or both, whether in the same factory or any factory in

India.

13. Except for omitting goods falling under Chapter 83 of the Schedule to the Central Excise Tariff Act, 1985 there is no substantive variation

between Notification No. 100/1988 and Notification No. 180/1988. Thus, the purport of the notification is that unwrought aluminium, whether

alloyed or not and cast articles of aluminium, would be exempt from duty, if they are manufactured from duty-suffered goods, falling under Chapter

76 or 83 of the Schedule.

14. As already pointed out, the notification in question is a conditional notification, wherein the exemption is only subject to the satisfaction of the

conditions stated therein on duty-paid materials, falling under Chapter 76 or Chapter 83, being used in the manufacture of unwrought aluminium,

whether or not alloyed. After the remand by the Tribunal, in the first instance, admittedly, the suppliers were examined by the Department and a

right to cross-examination was given to the appellant. As seen already, in question No. 18, the appellant herein cross-examined the supplier, which

reads as follows:

Are you availing of any exemptions under the Central Excise during the relevant period?

No.

In the face of such categorical statement made by the supplier and in the absence of any material produced by the Revenue to hold that such a

statement could not be accepted on its face value and further, in the absence of any letters from the supplier alleged to have been written and which

were relied upon by the appellate authority to disallow the claim, we do not find any justifiable ground to uphold the finding of the Tribunal that the

asses-see was not entitled to the benefit of exemption.

15. As rightly pointed out by the learned counsel for the appellant, when the very basis of the adjudicating authority''s order is not there, the

Tribunal''s order thereby suffers a serious infirmity in law, which calls for an interference by this court. We may point out that the Tribunal, in its

order, in paragraph 5 clearly pointed out that in the cross-examination, no doubt Mr. Anser Basha of M/s. B. S. Metal Mart stated that they had

not availed of any exemption. Commenting on the reliance placed by the assessee on this answer given by the supplier, the Tribunal pointed out

that the adjudicating authority had given a very well reasoned order. As already pointed out, if the Department felt that the statement of the supplier

was not reliable, nothing prevented it from going in for a further enquiry into the matter. In fact, as pointed out by the learned counsel for the

appellant, the registers pertaining to the suppliers were very much available before the Revenue and no efforts were taken to discredit any of those registers belonging to the suppliers. In the circumstances, we do not find any logic in the Tribunal raising a question as to why the supplier did not

pay the duty and the answer given towards the end of paragraph 5 to such a question raised, seems to be a vague one, not supported by any

material. In the circumstances, we set aside the order of the Tribunal, allow the civil miscellaneous appeal and hold that the appellant is entitled to

the benefit of exemption. No costs. Consequently, the above civil miscellaneous petition is closed.

