

(2011) 08 KAR CK 0055
In the Karnataka High Court
Case No : C.E.A. No. 10 of 2008

Mangalore Refinery and Petrochemicals Ltd.

APPELLANT

Vs

CCE, Mangalore

RESPONDENT

Date of Decision : 16-08-2011

Acts Referred:

Central Excise Rules, 1944 — Rule 100E, 35B, 37, 47, 52A
Customs Act, 1962 — Section 17, 46, 47, 47 (1)

Citation : (2012) 278 ELT 289 : (2013) 21 GSTR 58

Hon'ble Judges : Ravi Malimath, J;N. Kumar, J

Bench : Division Bench

Advocate : Chander Kumar and Associates, for the Appellant; N.R. Bhaskar, for the Respondent

Judgement

N. Kumar, J.—The assessee has preferred this appeal challenging the order passed by the Tribunal holding that the assessee is ineligible to avail Cenvat credit as the said Cenvat credit was availed after a lapse of six months of the date of issue of bill of entry following the decision of the Larger Bench on a reference to it on the aforesaid question of law. The assessee M/s. Mangalore Refinery and Petrochemicals is a public sector undertaking being the subsidiary of Oil and Natural Gas Corporation Limited. It refines crude petroleum oil at their oil refinery in Mangalore and also manufactures various petroleum products. The assessee is claiming Modvat credit on eligible capital goods and inputs since its inception of the scheme in the year 1986. In the month of September, 1999, the assessee took Modvat credit of Countervailing Duty (CVD) paid on various inputs imported during April to December, 1998.

2. The jurisdictional Superintendent of Central Excise issued a notice dated 27-3-2000 and a Corrigendum dated 3-4-2000 to the assessee calling upon them to show cause as to why the credit amounting to Rs. 2,15,72,897/- should not be disallowed on the ground that the credit had been availed after 6 months from the date of issue of the Bill of Entry held to be the same as the date of payment

of CVD. The assessee submitted a detailed reply justifying the credit claimed. However, the original adjudicating authority by his Order-in-Original dated 31-8-2004 allowed part of the credit and disallowed the Modvat credit availed on the Bills of Entry on the ground that the credit was availed after 6 months from the date of issue of bills of entry. Aggrieved by the said order, the assessee preferred an appeal u/s 35-B of the Central Excise & Salt Act, 1944 (hereinafter referred to as "the Act" for short) before the appellate Tribunal, Bangalore. In view of the conflicting opinions on the aforesaid question the Tribunal referred the matter to a Larger Bench to decide the following questions of law:

Whether the "Bill of Entry" is a document "issued" for the purpose of applying the provisions of Rule 57G(5) and thus covered by Rule 57G(5) of the Central Excise Rules?

The Larger Bench by its order dated 7-11-2006 answered the referred question in affirmative and sent back the case to the regular Bench for disposal of appeal in terms of his order. The Tribunal thereafter proceeded to answer the aforesaid issue and held that the Bill of Entry has to be treated as an original document for the purpose of Cenvat credit. In the instant case, the credit on the said Bill of Entry was taken after 6 months of the date of issue of the Bill of Entry and hence the assessee is ineligible to avail the credit. Aggrieved by the said order, the assessee has preferred this appeal.

3. The learned counsel appearing for the assessee assailing the impugned order contended that sub-rule (5) of Rule 57G of the Central Excise Rules, 1944 (for short hereinafter referred to as "the Rules") speaks of 6 months from the date of issue of any document specified in sub-rule (3) as the period of limitation. Therefore, the condition precedent for application of the said Rule is it should be from the date of issue of any document. The document referred to under sub-rule (3) except the Bill of Entry are the documents which are issued by the seller. In the case of Bill of Entry it is the purchaser-assessee who files the said document and therefore the said period has no application to the bill of entry. Consequently he contended that in the case of Bill of Entry after the Bill of Entry is filed with the customs authorities u/s 46 of the Customs Act, 1962, on receipt of such Bill of Entry the authority after examination and deciding the duty if any eligible on such goods shall be assessed and thereafter the said Bill of Entry is returned to the purchaser/assessee for payment of duty. It is only after the assessee-purchaser pays the duty as assessed the authority, pass an out of charge order and hand over the triplicate copy of the Bill of Entry along with the out of charge order to the assessee and on production of the said out of charge order the goods imported would be released by the authorities for home consumption. Therefore it is the date from which the duty is paid and out of charge order is passed and handed over to the assessee, the period of 6 months as stipulated in sub-rule (5) of Rule 57G is to be computed, and not 6 months from the date of the assessee handing over the Bill of Entry as required under Rule 46 of the Customs Act.

4. Per contra, the learned counsel appearing for the Revenue pointed out from the Circular issued by the Department bearing No. 275/109/96-CX, dated 26-11-1996 that in case imported inputs or the duty of filing of Bill of Entry the period of 6 months should be effected from the date of payment of duty and therefore it is the payment of duty which is starting point of limitation for 6 months under sub-rule (5) of Rule 57G of the Rules.

5. Therefore the point that arises for our consideration in this appeal is :

In the case of a manufacturer who receives the inputs in the factory under cover of "Bill of Entry" from what date the period of six months specified in sub-rule (5) of Rule 57(G) is to be calculated?

6. The Larger Bench of the Appellate Tribunal at Bangalore after considering the rival contentions held as under : "In the earlier judgment rendered by the Tribunal under Sections 46 and 47 of the Customs Act and the procedure they render which would have clinched the issue were lost sight of by the Benches which held that a Bill of Entry for home consumption was never issued. The importer of any goods other than goods intended for transit or transshipment is required to present to the proper officer of Customs, a Bill of Entry for home consumption or warehousing in the prescribed form. Such a Bill of Entry may be presented at any time after the delivery of the import manifest or import report as the case may be. The jurisdictional Commissioner of Customs can in special circumstances permit the Bill of Entry to be presented before delivery of the import manifest/import report. In respect of goods shipped for importation into India the vessel/aircraft is expected to arrive within 30 days from the date of such advance presentation of Bill of Entry. These are the relevant provisions of Section 46 of the Customs Act. In case of Modvat Credit of CVD paid on imported inputs cleared for home consumption, a Bill of Entry for warehousing is involved. Therefore, what is to be seen is the procedure in relation to Bill of Entry for home consumption."

7. Before the present EDI system was introduced, a Bill of Entry was required to be filed in quadruplicate by or on behalf of the importer and the proper officer of Customs would, after assessment of the duty on the goods covered by the document make an order known as "out-of-charge order". In subsection (1) of Section 47 of the Customs Act, permitting clearance of goods for home consumption could be made, if he was satisfied that the goods entered u/s 46 for home consumption were not prohibited goods and the importer had paid the duty assessed thereon and any charges payable under the Act in respect of the goods. Ultimately the importer would receive the triplicate copy of the Bill of Entry alongwith the out-of-charge order and would retain the same. This copy of the Bill of Entry carries the dates of filing, assessment, payment of duty, examination (second check) and out-of-charge order. Upon assessment of duty by the proper officer, the triplicate copy of Bill of Entry as required u/s 47(1) was to be returned to the assessee (importer) for payment of duty and other charges if any and accordingly the assessee should make the payments, whereupon the proper

officer would pass the out-of-charge order u/s 47(1). The triplicate copy of Bill of Entry (assessed) containing the payment of duty would be retained alongwith the out-of-charge order by the importer taking delivery of the goods for home consumption. Where the Bill of Entry was generated on E.D.I, system, duplicate and triplicate print-outs of the document would upon assessment and payment of duty be returned to the importer vide procedure laid down under the Bill of Entry (Electronic Declaration) Regulations, 1995 issued by the Board u/s 157 of the Customs Act. In the previous system it was only the triplicate copy of Bill of Entry that was returned at the same stage.

8, Bill of Entry as defined u/s 2(4) of the Customs Act means a Bill of Entry referred to u/s 46 of the Act. Section 46 provides for presentation of a Bill of Entry to the proper officer of customs by the importer for home consumption of the goods imported by the latter. Section 47 of the Act governs further procedure in relation to the document upto clearance of the goods for home consumption. This procedure includes return of Bill of Entry by the proper officer to the importer for the purpose of payment of duty assessed. After such payment of duty followed by the return of the Bill of Entry, the document is retained by the assessee and the same is the duty paying document specified under Clause "C of sub-rule (3) of Rule 57G or Clause "K" of the sub-rule as the case may be. These provisions have got to be interpreted in a manner consistent with the provisions of Sections 46 and 47 of the Customs Act. In a harmonious construction of the provisions the word "Issue" used in sub-rule (5) of Rule 57G has to be understood as meaning "return" used in Section 47(2) of the Customs Act. Therefore, in their view it is not correct to say that the triplicate copy of Bill of Entry mentioned in Clause "C of sub-rule (3) of Rule 57G or duplicate copy of Bill of Entry mentioned in Clause "K" of the said sub-rule, was not the document issued by any authority. Either of these documents should be held to be a document issued by the proper officer of Customs to the importer.

9. Sub-rule (5) of Rule 57G providing for a period of six months from the date of issue of any document specified in sub-rule (3) for the purpose of availment of input duty credit must be held applicable to the credit of CVD paid on imported goods cleared for home consumption, which payment is evidenced by triplicate copy of Bill of Entry or duplicate copy of Bill of Entry as the case may be. Ultimately they construed the limitation provision of sub-rule (5) of Rule 57G in relation to Clauses "C" and "K" of sub-rule (3) of the Rule in a manner consistent with the overriding provisions of Section 47 of the Customs Act and accordingly they held that the triplicate copy of Bill of Entry specified in Clause "C" of sub-rule (3) of Rule 57G and a duplicate of Bill of Entry specified in Clause "K" of the said rule or documents issued to the importer of input by the proper officer of Customs is in terms of Section 47 of the Customs Act and the relevant subordinate legislation under the Act".

10. It is the correctness of this finding with which we are concerned in this appeal. Rule 57G which deals with the procedure to be observed to the

manufacturer reads as under :

RULE 57G : Procedure to be observed by the manufacturer :- (1) Every manufacturer intending to take credit of the duty paid on inputs under (rule 57 A or rule 57B) shall file a declaration with the Assistant Commissioner of Central Excise having jurisdiction over his factory, indicating the description of the final products manufactured in his factory and the inputs intended to be used in the said final products and such other information as the said Assistant Commissioner may require, and obtain a dated acknowledgement of the said declaration.

(2) A manufacturer who has filed a declaration under sub-rule (1) may, after obtaining the acknowledgement aforesaid, take credit of the duty on the inputs received by him.

(3) No credit under sub-rule (2), shall be taken by the manufacturer unless the inputs are received in the factory under the cover of any of the following documents, namely:

(a) an invoice issued by a manufacturer of inputs under Rule 52A or 100E of the said Rules;

(b) an invoice issued by the manufacturer of inputs from the depot or from the premises of the consignment agent of the said manufacturer or from any other premises from where the goods are sold by or on behalf of the said manufacturer provided the depot or the premises, as the case may be, is registered under Rule 174;

(c) triplicate copy of a bill of entry;

(d) a certificate issued by an Appraiser of Customs posted in foreign post office;

(e) an invoice issued by a second stage dealer of excisable goods, registered under Rule 174;

(f) an invoice issued by a second stage dealer of excisable goods registered under Rule 174 and duly authenticated by the proper officer;

(g) an invoice issued by a dealer on or before the 31st day of August, 1996;

(h) an invoice issued by an importer registered under Rule 174 and duly authenticated by the proper officer;

(i) an invoice issued by an importer from his depot or from the premises of the consignment agent of the said importer provided the said depot or the premises, as the case may be, is registered under Rule 174, and duly authenticated by the proper officer;

(j) an invoice issued by a first stage or second stage dealer of imported goods registered under Rule 174 and duly authenticated by the proper officer.

(k) duplicate copy of a bill of entry generated on Electronic Data interchange System installed in any Customs or Central Excise Commissionerate;

(l) a certificate issued by the Superintendent of Central Excise or by the proper officer in the Customs area under Rule 57E; and

(m) an invoice issued by a manufacturer of final products under sub-rule (3) of Rule 57F or sub-rule (1) of Rule 57S.

Explanation. - for the purpose of this section :

(i) "first stage dealer" means a dealer who purchased the goods directly from:

(a) the manufacturer under the cover of an invoice issued under Rule 52A or Rule 100E or from the depot of the said manufacturer or from any other premises from where the goods are sold by or on behalf of the said manufacturer, under cover of an invoice issued under z 57G; or

(b) an importer or from the depot of an importer or from the premises of the consignment agent of the importer, under cover of an invoice issued under Rule 57G.

(ii) "second stage dealer" means a dealer who purchases the goods from a first stage dealer.

(4) No credit shall be taken by the manufacturer in respect of invoices referred to in clause (g) of sub-rule (3) after the 30th September, 1996.

(5) Credit shall also not be taken by the manufacturer after six months of the date of issue of any document specified in sub-rule (3) and where the intermediate products manufactured by the user of inputs specified under Rule 57 are received by the manufacturer, after nine months-

11. It is not in dispute that in exercising the powers conferred by Section 47 of the Central Excise Act, 1944 and the Central Excise Rules, 1944, the Central Government made the Central Excise Rules, 2001 which should have come into effect from 1st day of July 2001 by the Notification No. 9/2001-C.E. (NT.), dated 1st March, 2001. The said notification was resisted and the Central Government made a Central Excise (No. 2) Rules, 2001 by issuing Notification No. 30/2001-C.E. (NT.), dated 21-6-2001. On the same day in exercise of the powers conferred by Section 37 of the Central Excise Act, 1944, the Central Government made the CENVAT Credit Rules of 2001. The period of limitation of six months which is contained in sub-rule (5) of Rule 57G was deleted. In other words to claim credit no period of limitation is now prescribed.

12. It is in the background of this legislative policy and intention of the Government we have to interpret the aforesaid provisions dealing with limitation, insofar as Bill of Entry is concerned. Section 46 of the Customs Act, 1962 for short hereinafter referred to as "Act" provides for entry of goods on importation, sub-section (2) of Section 46 specifically provides that the Bill of Entry shall

include all the goods mentioned in the bill of lading or other receipt given by the carriers to the consignor. Sub-rule (3) provides that a Bill of Entry under subsection (1) may be presented at any time after delivery of the import manifest or import report as the case may be. Section 17 of the Act deals with assessment of duty. It reads as under:

(1) After an importer has entered any imported goods u/s 46 or an exporter has entered any export goods u/s 50 the imported goods or the export goods, as the case may be, or such part thereof as may be necessary may, without undue delay, be examined and tested by the proper officer.

13. A reading of the aforesaid provisions makes it clear that after the importer has entered for imported goods u/s 46 then without undue delay the assessing authority has to examine and test the same. After such examination and testing, the duty if any levyable on such goods is assessed. Thereafter the stage of clearance of goods for home consumption is arrived at, which is provided in Section 47 of the Act which reads as under :

(1) Where the proper officer is satisfied that any goods entered for home consumption are not prohibited goods and the importer has paid the import duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance of the goods for home consumption.

(2) Where the importer fails to pay the import duty under sub-section (1) within seven days from the date on which the bill of entry is returned to him for payment of duty, he shall pay interest at such rate, not below ten per cent. and not exceeding thirty per cent, per annum, as is for the time being fixed by the Board, on such duty till the date of payment of the said duty :

Provided that where the bill of entry is returned for payment of duty before the commencement of the Customs (Amendment) Act, 1991 (55 of 1991) and the importer has not paid such duty before such commencement, the date of return of such bill of entry to him shall be deemed to be the date of such commencement for the purpose of this section:

Provided further that if the Board is satisfied that it is necessary in the public interest so to do, it may, by order for reasons, to be recorded, waive the whole or part of any interest payable under this section."

14. If the importer pays the import duty as assessed, the proper officer may make an order permitting clearance of the goods for home consumption. It is only thereafter the importer can bring the goods imported to his factory under the cover of the said Bill of Entry or any other document mentioned in subsection (3) of Rule 57G. Except in the case of the Bill of Entry as provided in Clause "D" or "K" inspite of all other documents, six months period has to be calculated from the date of issue of the document. There is no difficulty in understanding the date of issue in respect of those documents. The problem arises only in the

case of Bill of Entry, a document which is prepared by the importer, who files the same with the authority concerned for retrieving the goods which is imported. It is not a document issued by the importer but is a document emanating from the importer himself. The date of issue of such document resulted in the aforesaid controversy.

15. Therefore the question is, whether it is the date on which the importer presented the Bill of Entry to the authorities has to be taken into consideration or is it the date on which the authorities after examination and assessment levied customs duty, returned the Bill of Entry to the importer is the date to be taken into consideration or the date on which the importer pays the duty as per the demand, or is it the day on which the authority specified that the duty is paid, passes an order which is known as "out-of-charge order" u/s 47(1) of the Act which is to be taken into consideration. Infact, unfortunately before the larger bench, the revenue did not point out how they have understood this provision as it clear from a detailed circular issued by them bearing No. 275/109/96-CX., dated 26-11-1996 produced as Annexure-"C" to the statement of objections filed before this Court. The relevant portion of the circular reads as under:

Whether the 6 months period for the purpose of taking credit shall be computed from the date of payment of duty in case of imported inputs or the date of filing bill of entry."

Clarification:

The period of 6 months should be computed from the date of payment of duty.

Point-5

What should be the date for computing 6 months period to avail the Credit under Rule 57G where-

(i) Transporter's copy of the invoice is lost and the credit is permitted after a period of 6 months.

(ii) Credit is taken under Rule 57E of duty paid on a date after 6 months of duty paid originally.

Clarification:

(i) & (ii) 6 months period may not apply in such cases as restriction of 6 months is applicable only to those cases where the assessee himself takes/avails the credit. It would be however appropriate to take credit in such cases within 6 months of the date of permission given by the Assistant Commissioner on the strength of original copy (where duplicate copy is lost). Similarly credit can be taken within 6 months of the date of issue of certificate under Rule 57E by the Range Superintendent."

16. Therefore, the department understood these provisions insofar as the Bill of Entry is concerned as six months from the date of payment of duty. This circular

is binding on the revenue. In the light of the circular the finding recorded by the larger bench that the six months period has to be computed from the date of Bill of Entry returned to the importer after assessment of the tax payable as the date for commencement of the claim on credit under sub-rule (5) of Rule 57G is ex facie incorrect. However, we may point out that in view of the aforesaid statutory provisions coupled with the fact that the said rules regarding limitation is no more in the statutory books any more, it would be proper to hold that six months period has to be computed from the date of handing over of the out-of-charge order to the importer. The reason being that even after payment of duty by the importer, unless an order u/s 47(1) of the Act is passed and that copy of the order is handed over to the importer he cannot get the goods for home consumption. If after such an order is handed over to him he commits delay in getting the goods, he cannot take advantage of such delay. But once the payment is made and the authority passes an order which is called as out-of-charge order and hands over a copy of the said order, the limitation for claiming credit starts from that date. That would be a proper interpretation to these provisions which would be in conformity with justice and equity apart from being harmonious with the aforesaid provisions. Therefore, though we accept the finding of the Larger Bench that Bill of Entry is a document issued as provided under Rule 57G, insofar as the date from which the limitation is to be computed for the purpose of sub-rule (5) of Rule 57G is concerned, it would be the date on which the order u/s 47(1) of the Act that is "out-of-charge" order is handed over to the importer.

17. Accordingly, the appeal is disposed of in terms of the aforesaid order answering the substantial question of law raised in favour of the assessee and against the revenue. In terms of the aforesaid declaration of law the appeal is partly allowed. However, as the facts in the case do not disclose when the Order u/s 47(1) is passed and handed over to the importer, we would remand the matter to the original authority to verify the aforesaid dates and find out whether the claim for credit was made within six months from the date of such order being handed over to the importer and then pass an appropriate order. This case is a glaring example of how precious judicial time is wasted because of the lethargy of the department in not bringing to the notice of the Tribunal and the Larger Bench of the Tribunal the notification that was issued as far as back in the year 1996. It is time that appropriate steps are taken and a responsibility be fixed on the concerned officials and the officials will keep in mind the circular issued by the Board and pass orders in terms of the circular and not play hide and seek game with the judicial authority which is evident in this case. It reflects on the functioning of the Department which we are sure the higher authorities would take note of and take appropriate steps to streamline the functioning of the department, in particular in respect to the matters which are pending before the authorities under Act.