
(1997) 05 DEL CK 0021

In the Delhi High Court

Case No : C.Ws. No"s. 3752 and 3753 of 1996, (On appeal from CEGAT Order No"s. 418-19/96-NB, dated September 11, 1996)

Maruti Udyog Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 30-05-1997

Acts Referred:

Citation : (1997) 96 ELT 521

Hon'ble Judges : Y.K. Sabharwal, J;D.K. Jain, J

Bench : Division Bench

Advocate : Shri V. Sridharan, for the Appellant; Shri A.K. Vali and K.S. Jaggi, for the Respondent

Judgement

Y.K. Sabharwal, J.—M/s. Maruti Udyog Limited (for short "MUL") manufactures motor vehicles. M/s. Bharat Seats Limited (for short "BSL") a joint venture with MUL, manufactures seats for motor vehicles for exclusive supply to "MUL". The seats is one of the inputs of the motor vehicles. The seat assembly consists of three parts. These parts are first manufactured by BSL and sold to MUL and thereafter are re-issued by MUL to BSL for manufacture of seats on job work basis after which BSL supplies the complete seats to MUL who uses it in the manufacture of their motor vehicles.

2. Prior to 21st January, 1989 parts of seats used to be physically transported by BSL to MUL under a gate pass. MUL availed Modvat credit on the basis of these passes. Thereafter the parts were physically re-supplied to BSL under the procedure for the purpose of sending inputs to job works as per Rule 57F(2) of the Central Excise Rules (for short referred to as "the Rules" hereinafter). It is, however, not in dispute that for the period after 21st January, 1989 which is the relevant period in these petitions, parts of seats did not physically move from factory of BSL to that of MUL. Therefore, the question of physical movement again from MUL to BSL does not arise. The Central Excise Duty was paid by BSL and credit was taken by MUL of the duty paid as per gate passes. They were

issued necessary challans under Rule 57F(2).

3. The Central Excise Department initiated proceedings against MUL and BSL for the period after 21st January, 1989. The case of the Department against MUL was that there was no physical movement of the parts and MUL is not entitled to claim Modvat credit. Against BSL, the case of the Department was that the parts of seats manufactured by them were wholly exempt from duty under Serial No. 1 of Notification No. 80/90 and, Therefore, BSL could not have paid duty on parts which are exempt under the Notification. The further case of the Department was that BSL is not entitled to Modvat credit of excise duty paid on raw material used by it in the manufacture of parts of seats because of the bar for Modvat credit under Rule 57C. Rule 57C inter alias provides that no credit of duty paid on inputs used in the manufacture of a final product shall be allowed if the product is exempt from whole of duty of excise payable thereon.

4. The Central Excise Department issued show cause notices to MUL and BSL seeking to recover Modvat credit and proposing to levy penalty. The Commissioner of Central Excise passed the orders dated 15th December, 1993 directing the reversal of Modvat credit and raising a demand of Rs. 39,95,72,061/- against MUL and also imposing on it a penalty of Rs. 10 crore. Against BSL the duty demand is Rs. 25,45,78,948/- besides penalty of Rs. 5 crores. These duties have been demanded by way of recovery of wrongfully availed "Modvat" credit.

5. MUL and BSL have filed appeals against the order of adjudication dated 15th December, 1993 passed by Commissioner of Central Excise. The appeals are pending before Customs, Excise & Gold (Control) Appellate Tribunal (CEGAT). On the stay applications filed along with the appeals u/s 35F of Central Excises and Salt Act the Tribunal has directed that the appeal of MUL be heard on deposit by MUL of Rs. 20 crores on or before 15th October, 1996 which may be done by reversal of credit in the Modvat credit register and on compliance of the order of deposit, the pre-deposit of the balance of duty amount and of penalty is waived and recovery stayed during the pendency of the appeal. In the case of BSL, the Tribunal has directed pre-deposit of Rs. 5 crores and on compliance the pre-deposit of the balance amount of duty and penalty has been waived pending the disposal of the appeal.

6. MUL and BSL have filed these two petitions challenging the impugned order of CEGAT dated 11th September, 1996. This judgment would dispose of both the writ petitions.

7. The stand of the department against MUL in short is that the case is covered by Rule 57G(2) which lays down that no credit shall be taken unless inputs are received in the factory under cover of gate pass and since there was no physical removal of the goods but only documents were prepared, the MUL is not entitled to avail Modvat credit. The charge against MUL is that it had received gate passes of parts of seats without the inputs actually being received and they had

taken Modvat credit thereon and thereafter these parts were purported to be sent to BSL for being made into seats under Rule 57F(2) for job work. It is not disputed that in fact there was no movement of seat parts from BSL to MUL. Therefore, there would be no question of the seat parts being sent back by MUL to BSL.

8. In respect of BSL the case of the Department is that parts of seats manufactured by BSL are wholly exempt from duty under Serial No. 1 of Notification No. 80/90 and consequently BSL could not have paid duty on those parts as they are exempt under the Notification. According to the department, as a further consequence BSL was not entitled for Modvat credit of excise duty paid on the raw materials used by it in the manufacture of parts of seats.

9. The stand of MUL in brief is that it does not have any in-house facility for manufacture of seats; BSL is manufacturing seats exclusively for motor vehicles manufactured by MUL; the seat assembly consists of three essential parts - trim sets, steel frames and PU foam puddings and these three parts are first manufactured by BSL which pays duties on these parts under the relevant tariff heading and then these parts are sold to MUL. The parts are thereafter re-issued by MUL to BSL for manufacture of seats on job work basis where after BSL supplies the complete seats to MUL which in turn uses the seats in the manufacture of motor vehicles. According to MUL, BSL has a twin status, (1) as manufacturer of the three parts of the seat, and (2) as job worker for assembly and manufacture of the complete seats. According to MUL physical removal of the three parts by BSL to MUL is not necessary to avail Modvat credit. The stand of the MUL is that its case is covered under Rule 57F(2) and MUL has issued challans in terms of procedure of Rule 57F(2). The MUL has also relied upon permission dated 21st July, 1987 granted by Central Excise Division, Rohtak to remove the inputs partially processed during the course of manufacture of final product outside the factory premises for tests/repairs/refining and reconditioning. Reliance has also been placed on behalf of MUL upon certain judgments of the Tribunal holding that failure to comply with the procedural requirement of Rule 57F(2) will not vitiate the credit taken on the inputs and that such failure is a condonable lapse.

In respect of BSL the Tribunal in the impugned order has come to the conclusion that its decision in the case of Everest Converters v. C.C.E.1995 (80) E.L.T. 91 Tri prima facie supports the case of BSL that it is the choice of the assessed either to avail full exemption or to pay duty and avail of Modvat credit. In the case the Tribunal has read down Rule 57C to avoid cascading effect of duty upon duty. At the same time the Tribunal has noticed the fact that BSL had also been found to issue gate passes showing the consignee as MUL when in fact there was no clearance of goods outside their factory at all. In view of this factual position the Tribunal balanced the equities by directing the deposit of about 20% amount by BSL.

10. It has been vehemently contended on behalf of the respondents that

petitioners maintained record only in a make belief manner so as to appear to have complied with the provisions of law. It was submitted that the fact of MUL not actually receiving the inputs and not clearing the same from their factory was not brought to the notice of the Central Excise Department. Even in the purchase orders by BSL against entry "freight" MUL mentioned "already included in the price" leading to the conclusion that freight was charged because there was movement of goods. According to the Department Rule 57G(2) governs the case and the said rule mandates that no credit shall be taken unless inputs are received in the factory under the cover of a gate pass, a bill of entry or any other document as may be prescribed. It has been pointed out that in this case no goods were transported but gate passes were issued in absence of corresponding movements of goods. Regarding Rule 57F(2) it has been contended for the Department that challans are to be issued only when inputs are actually intended to be removed from the factory of the manufacturer to the job worker for the purpose of further manufacture and in this case since no input was received by MUL, the question of issue of challan under Rule 57(2) could not have arisen. These documents were prepared to create deception and avail Modvat credit without movement of goods in either direction. Regarding letter dated 21st July, 1987 it was submitted that permission for the period prior to 1989 cannot be relied upon and is of no avail because admittedly at that time there was movement of goods unlike the present position and also that at that time some parts were manufactured by BSL and some were imported by MUL and supplied to BSL. It was submitted that now no part is supplied by MUL to BSL. It has been further contended that the fact that admittedly the entire process of manufacture is undertaken by BSL shows that the documents are being created with a view to show movement of parts between MUL and BSL, though nothing is required to be done to the parts by MUL. According to the Department the object of making aforesaid documents is to avail Modvat to which MUL was not entitled.

11. Since the appeals against the order of adjudication are pending before the Tribunal we would refrain from expressing any opinion on the merits of the controversy lest it may prejudice the case of any of the parties before the Tribunal. The Tribunal has found that the petitioners have a prima facie case. There is no doubt that the points are arguable. Section 35F vests in the Tribunal a discretion to make as appropriate order so that the provision of deposit of duty amount as a condition for hearing appeal may not cause undue hardship to a person who appeals to the Tribunal against the order of the adjudicating authority. When the Tribunal finds that the person appealing has a prima facie or arguable case, it has discretion to make different orders depending on facts and circumstances of each case. The Tribunal has a discretion to grant waiver of deposit of the entire amount. It may grant waiver of deposit of part of the amount. It may impose such other condition as considered necessary in the facts and circumstances of the case including furnishing of Bank guarantee or security for whole or part of the amount. It is not necessary that in every case where arguable points are raised, the Tribunal has to grant waiver of the deposit of the

entire amount. The Tribunal has, of course, to exercise discretion on sound well settled principles governing such matters. The power of the Tribunal u/s 35F is somewhat akin to the power of the Court for grant of injunction under Order 39, Rules 1 & 2 or that of Appellate Court under Order 41, Rule 5, CPC. The Tribunal has to balance the equities. It would, of course, depend upon the facts and circumstances of each case to determine what order should be passed in exercise of power u/s 35F. In the very nature of things all possible situations cannot be conceived. In case the discretion of the Tribunal is not based on sound legal principles and results in undue hardship to a person this Court has ample power to interfere in exercise of its jurisdiction under Article 226 of the Constitution though not as an Appellate Court.

12. In the present case, the Tribunal after coming to the conclusion that the appeals raise arguable points has balanced the equities keeping in view the stand of the Excise Department which will also have to be given a serious consideration when the appeals are heard and decided. In the case of MUL, on consideration of entire facts and circumstances the Tribunal has directed deposit of an amount which is little less than 50% of the total amount of duty demanded and penalty and in case of BSL it is less than 20%. We are unable to accept the contention that the Tribunal has committed any illegality in exercise of the discretion. The petitioners have not pleaded financial hardship. We may, however, make it clear that the undue hardship in Section 35F is not applicable only on account of financial hardship and it can be extended to other cases of strong prima facie case even though the appellant may be in sound financial position to make the deposit. Even in such a case the waiver of deposit of entire amount can be granted. At the same time, we are also not laying down a general proposition that where the interest of the revenue is not in jeopardy as a necessary rule the Tribunal should grant waiver of the deposit of the entire amount. It would depend upon facts and circumstances of each case to determine the appropriate order to be passed in exercise of power by the Tribunal u/s 35F of the Act. We find no ground to interfere in the impugned orders.

13. For the reasons aforesaid the writ petitions are dismissed leaving the parties to bear their own costs. We grant to the petitioners time up to 31st July, 1997 to make deposit in terms of the order of the Tribunal. We have no doubt that when the amount is deposited the Tribunal would try to expedite the hearing of the appeals.

14. Writ Petitions dismissed.