(2013) 07 AHC CK 0192

In the Allahabad High Court

Case No : Central Excise Appeal No''s. 36 and 58 of 2005

M/s. Albert David Ltd. APPELLANT

Vs

Commissioner, Central Excise RESPONDENT

Date of Decision : 29-07-2013

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

Citation : (2013) 297 ELT 24 : (2014) 43 GST 30

Hon'ble Judges : Prakash Krishna, J;Manoj Kumar Gupta, J

Bench : Division Bench

Advocate : Amit Jaitely, Bharat Ji Agarwal and Piyush Agarwal in Central Excise Appeal Nos. 36 and 58 of 2005, for the Appellant; Ramesh Chandra Shukla in Central Excise Appeal Nos. 36 and 58 of 2005 and A.S.G.I. in Central Excise Appeal No. 58 of 2005, for the Respondent

Final Decision : Allowed

Judgement

Prakash Krishna, J.—The aforesaid appeals have been filed u/s 35G of the Central Excise Act. The Central Excise Appeal No. 36 of 2005 has been filed against the order dated 28th of December, 2004 passed by the Customs, Excise and Service Tax Appellate Tribunal in Excise Appeal No. E/2497-98/2002/NB(A) and Excise Appeal No. E/656/2003/NB(A). While Central Excise Appeal No. 58 of 2000 has been filed against the order dated 22nd of February, 2005 passed by the Appellate Tribunal in Excise Appeal No. E/764/04-NB(B).

2. The learned counsel for the parties jointly stated at the bar that identical questions of fact and law are involved in these appeals. The arguments were advanced with reference to the Central Excise Appeal No. 36 of 2005. The facts are taken from the record of the said appeal.

3. M/s. Albert David Ltd., the appellant, is engaged in manufacture of goods including intravenous fluids (IV Fluids) falling under the Chapter 30 of the Central Excise Tariff Act, 1985. During the course of manufacture (iv fluids) by form fill and seal technology plastic scrap is generated as waste. The appellant availed

exemption on clearance of waste and scrap under notification no. 89/95-CE dated 18th of May, 1995. The stand of the appellant that waste and scrap are exempt was not accepted by the department on the ground that the appellant was also manufacturing excisable goods other than the exempted goods. The case of the department is that the exemption under the aforesaid notification is not applicable to units where excisable goods other than the exempted goods are also manufactured. A show cause notice dated 1st of June, 2001 was served on the appellant on the ground that the appellant has wrongly availed the CENVAT credit on plastic granules equivalent to the quantity cleared by them as wastes and scrap. Through the said notice, a sum of Rs. 22,58,960/- was payable by the appellant for wrongly availing exemption. The reply to the show cause notice did not find favour with the Commissioner of Central Excise, Meerut who vide order dated 30th of March, 2002 upheld the show cause notice by holding that the wastes and scrap was generated during the course of manufacture of (iv fluids) and as such wastes and scrap is not final product of the appellant. This order was challenged in appeal before the Customs, Excise and Service Appellate Tribunal. Before the Tribunal there was a difference of opinion between the member(judicial) and member (technical) of the Tribunal and the matter was referred to a third member. By the order of majority the Tribunal held that CENVAT Credit is not available to the appellants. Hence the present appeals.

4. In the memo of appeal, the appellant has raised as many as five questions of law. Unfortunately, while admitting the appeal the substantial questions of law were not framed. During the course of argument when this fact was brought to the notice of the learned counsel for appellants, he submitted that out of five proposed questions of law the question nos. 1 and 2 as framed in the memo of appeal covers the entire controversy. The Court proceeded to hear the appeals with the consent of the learned counsel for the respondent on the following two substantial questions of law:-

(1) Whether in view of the admitted fact that plastic scrap generated in the manufacturing process has been treated as final product by the department on which the Excise duty has been demanded by the department and paid by the appellant under Central Excise and Tariff Entry No. 39.15, hence the appellant was entitled for the CENVAT Credit under Rule 57AA?

(2) Whether in view of the Circular issued by the Central Board of Excise & Customs dated 29th August, 2000 clarifying that CENVAT can be utilized for payment of duty on waste and scrap since they are final products within the definition of the word final products under Rule 57 AA (c) of the Rules, hence the Tribunal was not justified in denying the benefit of CENVAT Credit duty paid on in puts used in the manufacture of final products namely, the plastic scrap?

5. Heard Sri Bharat Ji Agrawal, learned senior counsel along with Sri Piyush Agrawal and Sri Aditya Bhattacharya for the appellant and Sri R.C. Shukla, learned counsel for the respondent department.

6. Learned senior counsel for the appellants submitted that the appellants are producing exempted goods as held by the Tribunal as well as dutiable goods in the shape of waste and scrap. The submission is that waste and scrap are finished on which duty is payable. Reference was made to Entry No. 39.15 of the first schedule of the Central Excise Tariff Act, to buttress the argument that the waste and plastic scrap all finished goods are dutiable at the rate of 16 per cent. On a true and correct interpretation of Rule 57AB, where a manufacturer is producing exempted and dutiable items, is entitled to take CENVAT Credit in respect of proportionate inputs. Therefore, the duty paid on the plastic granules, which were used for manufacturing of bottles and in the process of which scrap was also recovered, CENVAT Credit is available, in respect of the duty paid on plastic granules. In reply, the learned counsel for the department refuted the above submission and submitted that the appellant has not maintained the separate accounts of exempted items and dutiable items is, therefore, not entitled to claim CENVAT Credit.

7. Considered the respective submissions of learned counsel for the parties and perused the record.

8. A bare perusal of the order of Tribunal would show that there was two kinds of controversies were before it.

9. The one-whether intravenous fluids (IV Fluids), which were used for sugar, electrolyte or fluid replenishment were exempt from duty vide SR no. 56 of the table to the notification. After a great deal of discussion, the Tribunal held that the benefit of exemption notification under Entry no. 47 K of notification No. 6/2000-CE (as amended) by notification No. 36/2000-CE dated 4.5.2000 is available to the appellant. It consequently held that the demand of duty on the goods cleared during the period of dispute, so far as IV fluids is concerned is illegal. The said part of the order of Tribunal has attained finality and has not been challenged by the department any further in any manner. These appeals, therefore, do not concern with this part of the order.

10. The other aspect which was examined by the Tribunal was with regard to the CENVAT Credit. The appellant''s claim is that they are entitled to avail CENVAT Credit of duty paid on that quantity of plastic granules which was contained in the scrap. Member (judicial) of the Tribunal accepted the contention of the appellant but it was deferred by the member (technical). The order of Member (technical) is reproduced below:-

I agree with the order as recorded by the learned Member (Judicial), except the finding recorded in paragraph 12 of the order, which relates to the availability of CENVAT Credit of the duty paid on the plastic granules contained in the scrap. The appellants are not eligible to avail the CENVAT Credit of the duty paid on plastic granules, which are contained in the scrap. The plastic granules, admittedly, had been brought into the factory for manufacture of IV Fluids, which have been held to exempted by us in the present order. Once the inputs are used in or in relation to the manufacture of products, which are exempted from payment of duty, CENVAT Credit will not be available to the appellants. It is not the case of the appellants that they are bringing out inputs for the manufacture of scrap. The scrap arises as a result of process of manufacture undertaken by them on the inputs for getting the finished products. Therefore, the demand of duty, equivalent to the CENVAT Credit taken on inputs contained in the scrap, is up-held.

11. On difference of opinion the following question was framed and referred to third member (Vice President) for opinion:-

DIFFERENCE OF OPINION

Whether CENVAT credit of the duty paid on input (plastic granules) contained in the plastic scrap which was generated in the process of manufacture of IV Fluids and cleared by M/s. Albert David Ltd. (appellant) without payment of duty and on which duty was subsequently paid as demanded by the Revenue, was admissible to the said appellant as held by Member (Judicial)

OR

Whether such credit was not admissible to them as held by Member (Technical).

12. The relevant portion from order of the Vice President is reproduced below:-

I find that the manufacturer is not entitled to the CENVAT credit in case the final product is exempted from payment of duty. The appellants were receiving duty paid plastic granules, which is used in the manufacture of the final product, which is exempted from payment of duty. In this situation, I agree with the view taken by Hon''ble Member (Technical) that CENVAT credit will not be available to the appellants in respect of the inputs contained in the scrap generated during the manufacture of exempted goods. Therefore, the demand of duty equivalent to CENVAT credit taken on inputs contained in the scrap is upheld.

13. To resolve the controversy it is apt to notice certain the then relevant statutory provisions. Rule 57-AA of the Central Excise Rules, 1944 as it existed at the relevant point of time defines "capital goods" and "exempted goods". For the sake of convenience, the said Rule is reproduced below:-

Rule 57AA. Definitions. -For the purpose of this section,

(a) "capital goods", means-

(i) all goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90, heading No. 68.02 and sub-heading No. 6801.10 of the First Schedule to the Central Excise Tariff Act, 1985;

(ii) components, spares and accessories of the goods specified at (i)

above;

(iii) moulds and dies;

(iv) refractories and refractory materials;

(v) tubes and pipes and fittings thereof, used in the factory; and

(vi) pollution control equipment, used in the factory of the manufacturer of the final products.

Explanation.-For removal of doubts, it is hereby clarified that "capital goods: do not include any equipment or appliances used in an office.

(b) "exempted goods" means goods which are exempt from the whole of the duty of excise leviable thereon, and includes goods which are chargeable to "Nil" rate of duty;

(c) "final products" means excisable goods manufactured or produced from inputs, except matches;

(d) "input" means all goods, except high speed diesel oil and motor spirit, commonly known as petrol, used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not, and includes accessories of the final products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used for manufacture of final products or for any other purpose, within the factory of production, and also includes lubricating oils, greases, cutting oils and coolants.

Explanation.-The high speed diesel oil or motor spirit, commonly known as petrol, shall not be treated as an input for any purpose whatsoever.

Rule 57-AB is relevant for claiming CENVAT Credit. It provides that a manufacturer or producer of final product shall be allowed to take credit of the duty of excise specified in the first schedule to the Central Excise Tariff Act. For the sake of convenience, the said Rule is reproduced below:-

RULE 57 AB. CENVAT credit.-(1) A manufacturer or producer of final products shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of,-

(i) the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) (hereinafter referred to as the said First Schedule), leviable under the Act;

(ii)...........

(iv)...........

(v)...........

paid on any inputs or capital goods received in the factory on or after the first day of April, 2000.

Explanation.-..........

(b) The CENVAT credit may be utilised for payment of any duty of excise on any final products manufactured by the manufacturer or for payment of duty on inputs or capital goods themselves if such inputs are removed as such or after being partially processed, or such capital goods are removed as such.

14. The learned counsel for the appellant submitted that scrap and waste is final product and excisable item. The duty is payable at the rate of 16 per cent. This being so, the submission is that in view of the aforestated Rules, the appellant is entitled to take credit of CENVAT paid on the inputs. At this stage, the learned counsel for the department referred the Rules-3 and 6 of the CENVAT Credit Rules-2004.

15. At the very outset, it may be stated that these Rules were not in force and are not applicable to the facts of the present case as the dispute relates to the period prior to the year-2004. The show cause notice dated 1st of June, 2001 asking the appellant to justify the CENVAT Credit availed by it on plastic granules equivalent to the quantity cleared by them as waste and scrap. We find sufficient force in the argument of the learned counsel for the appellant that CENVAT Credit Rules-2004 will not be applicable to the controversy on hand.

16. There cannot be any doubt that waste and scrap is not final product within the meaning of Central Excise Rules-1994. For the simple reason that it is chargeable to duty. The said item is not "exempted goods" within the meaning of Rule 57 AA (2) referred to above.

17. The above proposition was not found disputed by the learned standing counsel for the department.

18. The majority view of the Tribunal proceeds on the footing that the appellant is not entitled to the CENVAT Credit in case the final product is exempt from the payment of duty. There appears to be no quarrel to this proposition. But here is a case where one of the final products of the appellant is exempt from the payment of duty. At the same time, the department is charging the duty on the plastic scrap generated in the manufacturing of product which is exempt from the payment of duty. It could not be disputed by the learned counsel for the department that the waste of plastic is liable to duty at 16 per cent under tariff Entry no. 39.15 of the first schedule of the Central Excise Tariff Act. The appellant submitted that on clearance of waste and scrap of plastic, duty @ 16 per cent has been paid under the aforesaid tariff heading no. 39.15.

19. Our attention was also drawn to a circular issued by the Government of India, Ministry of Finance (Department of Revenue) dated 29th of August, 2000, its clause-6 in particular which reads as follows:-

6. Some references have been received seeking clarification whether CENVAT credit can be utilized for payment of duty on waste and scrap. The answer to this query lies in the affirmative for the simple reason that waste and scrap are "final

products" within the definition under Rule 57 AA (c).

20. The above circular issued by the department supports the contention of the appellant and the said circular is relevant being contemporaneous exposition by competent authority. Although reference was made to certain decisions of the Apex Court holding that such circulars issued by the department which are against the department and favours the assessee/manufacturer is binding on the department. It is not necessary to burden this judgment by referring them.

21. The Apex Court in Rohitash Kumar and Others Vs. Om Prakash Sharma and Others, has observed that rule of "Contemporanea Expositio" is a well established rule of interpretation of statutes with reference to exposition which the statute received from contemporary authorities. The Court added words of caution to the effect that such a rule must give way, where the language of the statute is plain and unambiguous. The said principle has been applied, as observed by the Apex Court in the above judgment by holding that contemporanea expositio as expounded by administrative authorities, is a very useful and relevant guide to the interpretation of the expressions used in a statutory instrument. The words used in a statutory provision must be understood in the same way, in which they are usually understood, in ordinary common parlance with respect to the area in which, the said law is in force or, by the people who ordinarily deal with them. By making a reference to Desh Bandhu Gupta and Co. and Others Vs. Delhi Stock Exchange Association Ltd., the Court observed that the principle of contemporanea expositio i.e. interpreting a document with reference to the exposition that it has received from the Competent Authority, can be invoked though the same will not always be decisive with respect to the questions of construction. The principle laid down as noted above, is fully applicable to the facts of the case. The letter/circular of the board which is competent authority favours and supports the stand of the appellant.

22. Having said so as above, in view of the fact that the waste and scrap is final product and excisable item, taking into consideration the scheme of CENVAT Credit, it is but obvious that the appellant is entitled to claim CENVAT Credit on the inputs of plastic granules proportionate to the waste and scrap. The Tribunal lost the sight of this aspect of the matter.

23. Having regard to what has been said above, it is held that the appellant was entitled for CENVAT Credit under Rule 57AA of the Central Excise Rules on proportionate plastic granules which generated the scrap in the manufacturing process of intravenous fluids (IV Fluids).

24. In the result, the appeals succeed and are allowed.

25. The impugned orders holding that the appellant is not entitled for CENVAT Credit on waste and scrap are incorrect in law. It is hereby held that in view of the Rule-57 AA of the Central Excise Rules the appellants are entitled for CENVAT Credit on proportionate plastic granules which generated the scrap in the manufacturing process of intravenous fluids (IV Fluids).

