
(2013) 09 AHC CK 0048

In the Allahabad High Court

Case No : Central Excise Appeal No. 73 of 2004

M/s. Securipax India Private Ltd.

APPELLANT

Vs

Collector of Central Excise, Noida

RESPONDENT

Date of Decision : 02-09-2013

Acts Referred:

Citation : (2013) 9 ADJ 655 : (2014) 299 ELT 417

Hon'ble Judges : Sunil Ambwani, J;S.P. Kesarwani, J

Bench : Division Bench

Advocate : Bharat Ji Agrawal, Gaurav Mahajan, Piyush Agarwal and Aditya Bhattacharya, for the Appellant; S. Chopra, for the Respondent

Final Decision : Dismissed

Judgement

1. This central excise appeal u/s 35G of the Central Excise Act, 1944 (in short the Act) arises out of the final order dated 9.3.2004 passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi (CESTAT, New Delhi) partly allowing the appeal, confirming the decision of the Commissioner (Appeals) in respect of CENVAT Credit of Rs. 51,811/- as well as penalty of Rs. 50,000/-, and has set aside the order in relation to the CENVAT Credits of Rs. 46,600/- and Rs. 30,05,054/- modifying the orders of Commissioner (Appeals) accordingly. By the same order the appeal filed by the revenue was allowed for the credit of Rs. 30,05,054/-. The appeal was admitted on 7.5.2013 on questions Nos. 1, 2, 3 and 5 in the memo of appeal, which were found to be sufficient to cover the entire controversy:

1. Whether the duty having been admittedly paid on the inputs stored outside the factory premises, which was received in the factory after 1.3.2001, the tribunal was not justified in not considering Rule 57(A)(B)(1) for the purposes of CENVAT credit of Rs. 30,05,054.00.

2. Whether the principle of law i.e., the applicability of Rule 57(A)(B)(1) being absolutely the same as for Rs. 46,600.00 and also for Rs. 30,05,054.00. The

tribunal was not justified in taking conflicting view in the same order merely because the application for permission was filed by the appellant.

3. Whether the tribunal was not justified in holding that prior permission of the Commissioner is required for storing the inputs outside the factory premises when the circular dated 1.5.1996 does not put such condition.

5. Whether the very same Deputy Commissioner after keeping the Application with him for over 1 year, returning the same on 19.3.2002, was justified in issuing a Show-cause Notice dated 8.4.2002 denying the credit only on the procedural ground of lack of permission from the Commissioner without on merits holding that the appellants are in any way disentitled to the credit? That there is no allegation that the inputs have not been used in the manufacture of final products or directed to third parties.

2. We have heard Shri Bharat Ji Agrawal, Sr. Advocate assisted by Shri Piyush Agarwal and Shri Aditya Bhattacharya for the appellants. Shri Siddhartha Shukla appears for the revenue.

3. Brief facts giving rise to this appeal are that M/s. Securipax India Private Limited-the appellant is engaged in the manufacture of excisable goods falling under Chapter 48 of the Central Excise Tariff Schedule for which the company obtained registration on 20.3.2001. The company is availing CENVAT Credit facility in respect of the inputs since 30.3.2001. The appellant had taken CENVAT Credit of Rs. 46,600/- in respect of inputs, which were not found available and stored in the registered factory premises. Another credit of Rs. 51,811/- was taken on inputs on 19.3.2001, prior to the date of Central Excise registration. The company had also taken CENVAT Credit of Rs. 30,05,054/- during the period March, 2001 to February 2002 in respect of inputs, which at the material time were stored outside the factory premises without prior permission of the jurisdictional Commissioner of Central Excise. The Deputy Commissioner, Central Excise, Noida disallowed these credits and imposed penalty of Rs. 31 lacs on the company. The Commissioner (Appeals) upheld the decision of the original authority in respect of Cenvat Credits of Rs. 46,600/- and Rs. 51,811/- but allowed the credit of Rs. 30,05,054/-. It also reduced the quantum of penalty to Rs. 50,000/-. In appeal the appellant challenged the denial of Cenvat credit of Rs. 46,600/- and Rs. 51,811/- as also imposition of penalty. The revenue also filed an appeal challenging the decision of lower appellate authority in respect of MODVAT Credit of Rs. 30,05,054/- and the deduction of penalty.

4. The CESTAT found that the CENVAT Credit of Rs. 46,600/- was taken on the inputs in March, 2001 and was utilised in April, 2001. The credit was denied on the ground that inputs were not found lying in the registered factory premise. They were lying elsewhere. The inputs were duty paid and had been used in the manufacture of final product. The CESTAT found that Rule 57AB(1) relied on by the Commissioner (Appeals) provides that the inputs should have been received in the factory after 1.3.2001. There was no allegation that the inputs in question

were not so received in the factory nor it was alleged that the inputs were not duty paid and not used in manufacture. The CENVAT Credit was thus found to be disallowed without any justification.

5. For CENVAT Credit of Rs. 51,811/-, it was admitted that the credit was taken by the company prior to the date on which their factory received the Central Excise registration. The Commissioner (Appeals) disallowed the credit on the ground that at the time, when the credit was taken the company was not within the control of the Central Excise authorities and was manufacturing and clearing goods, exempt from duty. The credit therefore according to CESTAT was not admissible.

6. So far as CENVAT credit of Rs. 30,05,054/- in respect of inputs, which were stored outside factory premises without obtaining prior permission of the Commissioner, Central Excise in terms of CBEC Circular dated 1.5.1996, the CESTAT held that admittedly the permission as required under the Circular was not taken by the company. The credit on inputs stored outside the factory premise could be taken only when such storage was made with the prior permission of the Commissioner, Central Excise, and after the goods were received inside the factory for being put to use in the manufacture of final product. Since the credit was admittedly taken, when the inputs were still lying outside the factory despite the undertaking given by the assessee in its letter dated 10.4.2001 to the Deputy Commissioner Central Excise that they will take credit only when the total consignment covered under a single invoice is received in the factory, there was no compliance with the procedure in the relevant period. The revenue appeal was as such allowed in relation to the credit of Rs. 30,05,054/-.

7. Shri Bharat Ji Agrawal, learned counsel for the appellant submits that the assessee company had informed the Deputy Commissioner, Central Excise, Division-II E-5 Sector-1 Noida on April 10th, 2001, that since there is shortage of space in the unit, the raw materials i.e. kraft paper, is being stored in the premise situate at A-21, Sector-8 Noida. The appellant company had also informed that in view of the shortage of space it will continue to store its products outside the factory premise and would receive them on pre-authenticated challans as per Boards' Circular dated 1.5.1996, and would follow procedure laid down under Bombay, Calcutta, T-N No. 46/96 dated 21.8.1996. Further it was stated in the letter that in addition to the maintenance of the registers at both the places, the assessee will take credit only when the total consignment covered under the single invoice is received in the factory. The text of the letter dated 10.4.2010 is quoted as below:

The Deputy Commissioner

Central Excise, Div. II

E-5, Sector-1

Noida (U.P.)

Dear sir,

SUB: STORAGE OF RAW MATERIAL OUTSIDE THE FACTORY PREMISES SITUATED AT A-21, SECTOR-8, NOIDA

It is submitted that we are engaged in the manufacture of corrugated carton boxes in our unit M/s. Securipax India Pvt. Ltd. B-1, B-2, B-31, B-32, Sector 1, Noida.

In the current budget the Excise duty has been imposed from 1st of March, 2001. We have obtained the Registration certificate from the Range Superintendent after complying all the required formalities.

There is a shortage of space in our unit and as such we were storing our raw materials i.e. kraft paper in the premises situated at A-21 Sector 8, Noida earlier to the imposition of the excise duty. In view of the shortage of space, we will continue to store our inputs outside the factory premises and receive them on pre-authenticated challans as per board circular No. 206/40/96-CX dated 1.5.1996 and follow the procedure laid down under Bombay Collectorate T.N. No. 46/96 dated 21.8.1996. In addition to the maintenance of registers at both the places we will take credit only when the total consignment covered under a single invoice is received in the factory.

It is submitted for your kind information. We are willing to carry out other instructions that your honour may prescribe for the storage of inputs outside the factory premises.

Submitted for information

Thanking your.

Yours faithfully,

FOR SECURIPAX INDIA PVT. LTD. (DIRECTOR)

8. Shri Bharat Ji Agrawal submits that in response to the information given by the appellant company dated 10.4.2001 the Deputy Commissioner, Central Excise, Division-II Noida by his letter dated 15.3.2002 had written to the assessee-appellant that in view of the Board's Circular dated 1.5.1999 and the trade notice dated 20.6.1996 by the Central Excise Commissioner, Meerut, for grant of permission for outside storage of duty paid inputs for which necessary procedure and safeguards are also required, the assessee was required to file an application to the Commissioner, Central Excise, Noida. The appellant was also informed that the Deputy Commissioner, Central Excise Division-II, Noida was not competent to consider the intimation and therefore the intimation vide letter dated 10.4.2001 cannot be considered as proper application and was rejected. Thereafter the show-cause notice was issued by the same authority on 8.4.2002 giving rise to the proceedings leading to the instant appeal.

9. Shri Bharat Ji Agrawal submits that the Commissioner (Appeals) found that in the show-cause notice it was alleged that since the goods were removed at some stage outside the factory premises, the appellants are guilty of having cleared the goods as such without payment of duty and therefore they became liable for payment of duty on all the inputs that were removed from the factory in violation of the Board's Circular of storage of goods outside the factory premise. The Commissioner (Appeals) held that what was alleged is that inputs were never used in manufacturing process. MODVAT credit was availed even prior to the receipt of the inputs in the factory. In the show case notice it was not disputed that these inputs are eligible for availing MODVAT credit and that assessee is in possession of the appropriate duty paying documents on the basis of which credit can be allowed. The charge that the assessee has been storing inputs outside the factory premises without observing the requirements laid down under the Board's circular were not made. The appellant was thus entitled to the credit, as in such case the appellants have committed only an irregularity. In view of the fact that there was no allegations that the inputs were not used in the manufacturing process or that the appropriate duty paying documents on the basis of which such credit has been taken are not available, the MODVAT credit of Rs. 30,05,054/- was allowed. The CESTAT allowed the appeal of the revenue on the allowance of credit of Rs, 30,05,054/- only on the technical ground of non-compliance of the CBEC Circular dated 1.5.1996, which stipulated proper permission of the Commissioner before storing the goods outside the factory premise, and on the grounds that the credit was taken while the inputs were still lying outside the factory unauthorisedly despite the undertaking given by the assessee in their letter dated 10.4.2001 to the Deputy Commissioner, Central Excise that they will take credit only when the total consignment covered under a single invoice is received in the factory.

10. Shri Bharat Ji Agrawal has relied on 2003 (108) ECR 1 78 in which it was held in paragraph 3 as follows:

3. It is clear from the records of the case that there is no dispute whatsoever about the receipt of the inputs in the factory and its utilization by the appellant in the manufacture of finished products. Similarly the aforesaid circulars of the Commissioner and Circular No. 206/40/96 CX., dated 1-5-96 issued by the Central Board of Excise and Customs permit storage of inputs outside the factory premises. The decision of the Tribunal in Thermax case also relates to storage of goods outside the licensed factory premises and the Tribunal held that the credit was permissible. Since both the sides are not disputing the actual receipt of duty paid inputs and their utilization in manufacture of specified final products, we find no justification for denying the credit or imposition of penalty. The deviations from normal practice necessitated by business exigencies are no ground for denial of legally available facility. The storage of inputs outside the factory premises, prior to being brought to the factory, is specifically recognised by the aforesaid Circulars of the Board and the Commissioner.

11. Shri Bharat Ji Agrawal has relied on Union of India Vs. Bharat Aluminium Co. Ltd., in which the Chhattisgarh High Court held in para 13 of the judgment that MODVAT credit could not be denied only on the basis of information furnished by the Superintendent, Central Office, Visakhapatnam on 9.8.1999 to the effect that the supplier did not submit the subject invoices alongwith their monthly return and details of the goods received and sold were not entered in RG 23D Register. Distinguishing the judgment of the Supreme Court in Mangalore Chemicals and Fertilisers Ltd. Vs. Deputy Commissioner of Commercial Taxes and others, , it was held that there is a distinction between non-observance of a procedural condition of a technical nature and non-observance of a substantive condition. Non-observance of procedural condition of technical nature's condonable, whereas non-observance of substantive condition would disentitle the assessee any exemption and refund under the Statute. Shri Agrawal submits that in the present case the non-observance of the procedural condition of obtaining the permission of the Jurisdictional Commissioner would not disentitle the MODVAT credit unless it was held that the inputs were not used in manufacturing the excisable goods.

12. Shri Bharat Ji Agrawal has also relied on C.C. and C.E., Meerut-II Vs. Muzaffarnagar Pipe Industries (P) Ltd., , in which the Division Bench of this Court held that there was no dispute that the inputs were received directly from its manufacturers and the invoice contained necessary endorsement, the Tribunal committed no illegality in dismissing the appeals of the department. Referring to the proviso to sub-rule (6) of Rule 57A it was held that such proviso does not indicate as to what are reasonable steps. It permits availing of MODVAT credit after ensuring the steps namely, "the assessee should receive the inputs directly from its manufacturers and secondly invoice should contain the necessary endorsement that the excise duty has been paid on the inputs." There was no finding nor any suggestion in the show-cause notice that the assessee was party to the incorrect endorsement. The assessee cannot be blamed for the same and in any case the liability, if it was not discharged, was of the manufacturer of the inputs. It could not be fastened on the assessee without any reason.

13. Learned counsel appearing for the revenue submits that it is admitted that the inputs were found lying outside the factory. The party had not taken permission from the Jurisdictional Commissioner, Central Excise for storing goods outside the factory premise in accordance with CBEC Circular dated 1.5.1996. The party also did not comply with its undertaking in the letter dated 10.4.2001 sent for permission that the credit will be taken only when the total consignment covered under single invoice is received in the factory. There was no compliance with the procedure in the relevant period and thus the CESTAT did not commit any error in allowing appeal of the revenue and denying MODVAT credit of Rs. 30,05,054/-. He has relied on CBEC Circular dated 1.5.1996, which reads as follows:

Subject-Admissibility of Modvat on inputs stored outside the factory premises.

The Board has been receiving representations on the issue relating to availment of MODVAT credit on material which is not received directly inside the manufacturer's premises and the same is required to be stored outside the factory premises and subsequently transhipped to the manufacturer's factory. This point was also raised in the 35th Central Advisory Council in meeting held on 4th November, 1995 wherein it was represented that as no invoices/subsidiary gate passes can be issued from the storage space outside the factory, there is a danger of modvat credit being lost.

2. The matter has been examined by the Board and it has been decided to allow Modvat credit in such type of situations where the manufacturer after buying the goods cannot bring these inputs inside the factory premises on account of shortage of storage space, hazardous nature of inputs etc.

I am further directed to say that such manufacturers can seek permission for storage of Modvatable goods outside the factory premises from the Jurisdictional Commissioner of Central Excise and the said permission will be granted treating the storage point as an extension of the factory premises. Suitable safeguards of protect revenue interests should, of course, be taken to prevent misuse of this facility. Credit in such cases will be taken in the books of accounts only when the entire inputs covered by invoice are received inside the factory for being put to use in production.

14. We have examined the show-cause notice and the findings recorded by the Commissioner (Appeals) and do not find any allegations or statement of facts that the Modvatable inputs stored outside the factory were brought within the factory and were used for manufacture of excisable goods. The entire show-cause notice is based on technical breach of failing to comply with the CVEC Circular dated 1.5.1996, which provides for seeking permission for storage of Modvatable goods outside the factory premise from the Jurisdictional Commissioner of Central Excise, in which case the permission will be granted treating the storage point as an extension of the factory premises. The circular seeks to protect the interest of revenue by providing suitable safeguards to prevent misuse of the facility. It further provides that the credit in such case will be taken in the books of accounts only when the entire inputs covered by invoice are received inside the factory for being put to use in production. It is not denied that the party had applied for permission by their letter dated 10.4.2001 to the Deputy Commissioner of Central Excise to which reply was given by him on 19.3.2002 that the applicant was required to file application to the Commissioner, Central Excise, Noida and not to the addressee namely Deputy Commissioner, Central Excise, Division-II, Noida. The permission was not granted, which was the essential condition for removal of duty paid inputs without payment of duty for storage outside the factory. In this case the Deputy Commissioner, Central Excise, Division-II had informed the petitioner that he is not competent to consider the intimation.

15. The CBEC circular dated 1.5.1996 was issued on the representations for

availing MODVAT credit on material, which is not received directly inside the manufacturer's premise and which were required to be stored outside the factory premise and subsequently to the manufacturer's factory. After considering this point in the 35th Central Advisory Council in its meeting dated 4th November, 1995, it was found that in such case there is danger of MODVAT credit being lost. The Board examined the entire matter and found that in the circumstances, when there is shortage of storage space or the inputs are of hazardous nature the permission can be sought from the Jurisdictional Commissioner, Central Excise for treating the storage point as an extension of the factory premises provided that credit in such case will be taken in the books of accounts only when the entire inputs covered by invoice are received inside the factory for being put to use in production.

16. It is not denied that the party was aware of this CBEC Circular dated 1.5.1996. It, however, instead of applying to the Jurisdictional Commissioner applied to the Deputy Commissioner, Central Excise, Division-II, Noida by way of information that the raw material is being stored due to shortage of space in the unit in the premise situate at A-21, Sector 8, Noida. The party intimated that in view of the shortage of space it will continue to store the raw material i.e. Kraft paper, the inputs outside the factory premise and receive them on pre-authenticated challans and follow procedure laid down under the Bombay, Collectorate TN 21.8.96. In addition to the maintenance of registers at both places the party undertook that it will take credit only when the total consignment covered under single invoice is received in the factory.

17. In the Order-in-original dated 28.8.2002 the Deputy Commissioner, Central Excise, Division-II, Noida while discussing Point No. 3 regarding the claim of MODVAT credit of Rs. 30,05,054/- held that the observance of the procedure in CBEC Circular is found basic and substantial requirement of law. After distinguishing the judgments cited by the party on facts it was held that party not only stored the modvatable inputs outside the factory without permission of the Jurisdictional Commissioner, but also availed the credit without bringing the entire goods under single invoice in the factory premise. The substantive requirement of law of the procedure as per Rule 57AE(3) read with CBEC Circular dated 1.5.1996, was not followed.

18. The CESTAT considered the questions all over again and found that the Commissioner (Appeals) accepted the fact that the procedure for storing the goods outside the factory premises was not followed but treated it as irregularity and allowed input credit on the ground that there was no allegation that the inputs were not used in the manufacturing process or that appropriate duty paying documents on the basis of which the credit has been taken were not available.

19. The requirement under CBEC Circular dated 1.5.1996 are by way of relaxation to the mandatory provisions of storing the modvatable inputs inside the factory premises, which is the requirement of Rule 57AB(1)(d). Any

relaxation from the mandatory compliance of the Rules must be construed strictly. The CBEC relaxed the mandatory condition of storing the modvatable inputs outside the factory on specific grounds namely on account of shortage of storage space, hazardous nature of inputs or the like. The reasons for storage of modvatable inputs outside the factory could be many and thus the discretion of storing such goods outside factory premise was left to the Jurisdictional Commissioner, Central excise, with a further condition that credit in such case will be taken in the books of accounts only when the entire inputs covered by invoice are received inside the factory for being put to use in production.

20. In the present case findings have been returned by all the Central Excise authorities that the required permission was not taken from the Jurisdictional Commissioner of Central Excise. The CESTAT observed that admittedly the credit was taken while the inputs were still lying outside the factory unauthorisedly despite undertaking given by the assessee in their letter dated 10.4.2001 submitted to the Deputy Commissioner of Central Excise that they will take credit only when the total consignment covered under single invoice is received in the factory. Having failed to take the permission of the Jurisdictional Commissioner of Central Excise for relaxation to store the inputs from the Jurisdictional Commissioner of Central Excise and further availing the credit against its own undertaking given by the party in its letter dated 10.4.2001, the appellant was not entitled to the input credit. There is no such statement of fact in the show-cause notice, in the order of the order-in-original or the appellate authority that the inputs under single invoice were brought in the factory premises and were used in the manufacturing process before the credit was taken in the books of account. The Commissioner (Appeals) has observed; "what has not been alleged is that the inputs were never used in the manufacturing process or the credit was availed even prior to the receipt of the inputs in the factory. The CC report also does not dispute that these inputs are eligible for availing MODVAT credit and that assessee is in possession of the appropriate duty paying documents on the basis of which credit can be allowed." The observations are in negative and not of actual use and availing of credit in the books after manufacture of excisable goods.

21. The Commissioner (Appeals) has instead of recording a positive finding that the inputs were used in manufacturing process and credit was availed after receipt of inputs in the factory, made a passing observation, for which there is no reference to any material on record. There is no statement of fact in the show-cause notice nor the Order-in-original any finding to that effect, which benefits the appellant.

22. The decisions cited at the bar are distinguishable on facts and are not applicable to the present case. In *Mangalam Enterprises (Supra)* there was no dispute of actual receipt of duty paid inputs and their utilisation in the manufacture of specified final products. In *C.C. & C.E. Meerut-II v. Muzaffarnagar Pipe Industries (P) Ltd. (Supra)* the Court found that the

conditions in the notifications on direct receipt of inputs from manufacturer and endorsement on invoice that excise duty was paid was satisfied; and in *Union of India v. Bharat Aluminium Co. Ltd.* (Supra) it was held that allegations, which were not part of show-cause notice could not be made a ground for confirming the demand. It was held that non-observance of procedural condition could not be a ground to deny the credit when there was no dispute regarding duty payment and the use of goods in manufacture of final products. In *Mangalore Chemicals & Fertilizers Ltd.* (Supra) it was held that unnecessary technicalities, which are matter of form and not one of the substance would not justify the level of permission.

23. For the aforesaid reasons, we do not find that CESTAT committed any error of law in recording finding that the Commissioner (Appeals) had erred in law in allowing the credit to the assessee after holding that the appellant had not observed the procedure prescribed for relaxation to store inputs outside the factory premises.

24. The questions of law Nos. 1, 2, 3 and 5 as framed in the memo of appeal are thus decided in favour of revenue and against the party-appellant. The central excise appeal is dismissed.