(2014) 04 AHC CK 0176

In the Allahabad High Court

Case No : Central Excise Reference No. 3 of 2004

Ravi Steel APPELLANT

Vs

Commissioner of Central Excise RESPONDENT

Date of Decision : 04-04-2014

Acts Referred:
Central Excises and Salt Act, 1944 — Section 3, 3(1), 3(1A)

Citation : (2014) 304 ELT 484 : (2014) 48 GST 255 : (2014) 28 GSTR 297

Hon'ble Judges : Suneet Kumar, J;Ashok Bhushan, J

Bench : Division Bench

Advocate : A.P. Mathur, Advocate for the Appellant; S.P. Kesarwani and R.C. Shukla, Advocate for the Respondent

Judgement

1. Heard Shri A.P. Mathur, learned counsel for the appellant and Shri R.C. Shukla appearing for the respondent. In this Central Excise Reference, following are the questions which have been referred for consideration:

(i) Whether the benefit of Notification No. 202/88-C.E., dated 20-5-1988 can be denied when Railways have paid duty on the auctioned old rails while purchasing the same and the same has been sold to the applicant as such?

(ii) Whether the duty paid goods after being discarded becomes non-duty paid by lapse of time and extensive use?

(iii) Whether the old rails purchased from the Railways can be clearly recognised as non-duty paid when the Central Board of Excise & Customs, New Delhi, had issued various Circulars that re-rollable maters used without undergoing the process of melting in the manufacture of goods falling under Chapter 72 or Chapter 73 are eligible for deemed credit at the rate of Rs. 9.20 per M.T?

(iv) Whether the benefit of Notification No. 202/88-C.E., dated 20-5-1988 can be denied when the rails purchased by the railways are admittedly rollable or re-rollable materials and by serial and by Serial No. 2A in the table annexed to the Notification No. 202/88 the rollable or re-rollable materials are specified as inputs in the manufacture of bars and rods of Iron or steel for the purpose of granting exemption to the said bars and rods and the final product manufacture by the applicant viz. M/s. round bars are specified as final products in the aforesaid Notification?

2. The applicant is a manufacturer of ''MS round bars'' manufactured from the old rails purchased from Railway through auction as raw material. The applicant claimed the benefit of Notification No. 202/88-C.E,, dated 20-5-1988 in respect of their final product.

3. The applicant had cleared their final product from the period October 1993 to February 1994. A show cause notice was issued to the applicant to show cause as to why the duty not paid on the removal of goods should not be demanded and recovered from them.

4. The show cause notice was replied. The Adjudicating Authority vide its order dated 6-10-1994 confirmed the demand of duty. The adjudicating authority held that the applicant were not entitled for the benefit of exemption under notification dated 20-5-1988. An appeal was filed by the applicant which too was dismissed by the Collector (Appeals). The applicant thereafter filed an appeal before the Customs, Excise & Gold (Control) Appellate Tribunal. The Tribunal by following the ratio as law laid down by the Larger Bench of the Tribunal in the case of 1996 (64) ECR 1 00 dismissed the appeal. The reference application was allowed by the High Court on 27-2-2003 and the four questions as noted above were referred for consideration by this Court.

5. Shri A.P. Mathur, learned counsel appearing for the applicant submit that the applicant manufactured ''MS found bars'' from the old rails purchased from Railway through auction as raw material. He submits that old rails are all duty paid and there is no occasion for demanding duty from the applicant when same is purchased in auction and used as raw material for manufacture of final product.

6. He submits that the Adjudicating Authorities without there being any basis have treated that Rails were not duty paid whereas there was no basis for drawing any such presumption and burden was on the department to establish that the goods were recognizable as non-duty paid. Goods were clearly recognizable and non-duty paid. He submits that Adjudicating Authority committed an error while saying that "this is well known that these are not duty paid". He submits that the Appellate Authority as well as the Tribunal without adverting to the notification dated 20-5-1988 has dismissed the appeal. Shri Mathur has placed reliance on the judgment of this Court reported in Laxmi Rolling Mills Vs. C.E.G.A.T., New Delhi, as well as the judgment of the Apex Court reported in Vivek Re-Rolling Mills Vs. Collector of Central Excise, . He has further submitted that after the aforesaid judgment of the High Court even the Tribunal has been passing orders accepting the case which was set up by the applicants. He has referred to an order of the Tribunal also in this regard.

7. Shri R.C. Shukla, learned counsel appearing for the department submits that a

finding has been recorded by the Adjudicating Authority that raw material was not duty paid, hence the benefit of the notification was rightly denied. He has further submitted that Tribunal has rightly relied on the Larger Bench judgment reported in 1996 (64) ECR 1 00 .

8. We have heard the learned counsel for the parties and perused the record.

9. The issue raised in the present case is with regard to interpretation of the notification dated 20-5-1988. It is useful to quote the said notification at page Nos. 27, 28 of paper book.

Exemption to certain final products of Iron and steel made from specified input materials and falling under Chapter 72 or 73 or heading 84.85. -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. 90/88-Central Excise, dated the 1st March, 1988, the Central Government hereby exempts goods of the description specified in column (3) of the Table hereto annexed (such goods being hereinafter referred to as "final products)" and falling within Chapter 72, Chapter 73 or heading No. 84.54 of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), from the whole of the duty of excise leviable thereon which is specified in the said Schedule:

Provided that such final products are made from any goods of the description specified in the corresponding entry in column (2) of the said Table (such goods being hereinafter referred to as "inputs") and falling within the Chapter 72 or Chapter 73 of the said Schedule on which the duty of excise leviable under the said Schedule or the additional duty leviable under the Customs Tariff Act, 1975 (51 of 1975), as the case ay be, has already been paid:

Provided further that no credit of the duty paid on the inputs has been taken under rule 56A of the said rules.

Explanation.- For the purposes of this notification, all stocks of inputs in the country, except such stocks as are clearly recognisable as being non-duty paid, shall be deemed to be the inputs on which duty has already been paid.

10. The explanation to the notification as quoted above clearly indicate that all inputs except such stocks as are recognizable as being non-duty paid, shall be deemed to be the inputs on which duty has already been paid.

11. Old rails which were purchased by the applicant in auction from the Railways cannot be treated to be stock clearly recognizable as being non-duty paid.

12. There is no material referred to in the adjudicating order to come to finding that the old rails purchased by the applicant was not duty paid. As observed above, the Adjudicating Authority while holding that the old rails were not duty paid has wrongly assumed that ''''this is well known that these are not duty paid".

13. The First Appellate Authority and the Tribunal had not adverted to the issues

raised and have passed an order dismissing the appeal. The same issue came for consideration before this Court in Laxmi Rolling Mills & Others (supra). In the said case also the manufacturer had claimed the benefit of notification dated 20-5-1988 and they were also manufacturer of ''MS round bars'' as was final product.

14. The facts as indicated in the said case also indicate that the inputs were purchased from railway auction. The said fact has been noted in paragraph-2 of the judgment, which is quoted as below:

"Brief facts giving rise to the present writ petitions are that the petitioners are engaged in manufacture of bars and rods of mild steel from Tollable and re-rollable old and discarded rails wheels, fishplates etc. purchased from railway auctions without melting the same. The petitioners are duly registered with the Central Excise Department. The petitioners were availing the benefit of Notification No. 202/88-CE., dated 20-5-1988 as amended by Notification No. 33 of 1992-C.E., dated 1-3-1992 in respect of clearance of their final products. The claim of the petitioners is that in terms of the said notification MS. round bars were eligible for clearance at nil rate of duty if the same were manufactured out of rollable/re-rollable materials which are clearly recognizable as duty paid. The petitioners were served with a notice of demand- cum-show cause as contained in Annexure-2 to each writ petitions on the ground that the petitioners have cleared their end-products at nil rate during the period of August, 1992 to February, 1994 by availing the benefit of notification as aforesaid though the said notification was not applicable in their case. The petitioners were required to show cause to the Commissioner Central Excise, respondent No. 2 as to why the amount as mentioned in the show cause be not recovered from them towards duty and as to why they may not be penalized for contravening the various provisions of the Central Excise Act and Rules framed thereunder. The petitioners filed show cause reiterating that they were entitled to the benefit of Notification No. 202 of 1988-C.E., dated 20-5-1988 as amended by subsequent Notification No. 33 of 1992-C.E., dated 1-3-1992 as they were using unserviceable rails, fishplates etc. classifiable under Chapter 73 of the Central Excise Tariff Act, 1985 purchased in auction directly from the railways and consequently the duty paid nature of the said goods cannot be doubled. It was the case of the petitioners that the railway had paid excise duty at the time of purchase of the goods and after use of the same were auctioned in the same conditions as unserviceable goods. Any item which is duty paid does not become non-duty paid by mere prolonged use of the same. Respondent No. 2 passed adjudication order as contained in Annexure-4 to each writ petitions holding that the petitioners did not correctly declare the nature and character of the inputs and they suppressed the facts and illegally claimed the benefit of exemption under the Notification. It was also held by respondent No. 2 that the extended period of limitation could be invoked in the cases as the facts were suppressed and illegal claim of benefit of exemption under the Notification was made. Feeling aggrieved by the said order the petitioners filed separate appeals before respondent No. 1. The appeals were finally decided by respondent No. 1 vide order, dated 29-8-2000 issued on 3-10-2000 and served upon the petitioner on 10-11-2000. The order, dated 30-12-1997 passed by respondent No. 2 and the order, dated 29-8-2000 as affirmed by respondent No. 1 are sought to be quashed by issuing a writ of certiorari. Further prayer made is to issue a writ of mandamus directing the respondents to give benefit of the aforesaid notification.

15. This Court after considering all the relevant facts has held following paragraphs 9 & 10.

9. A combined reading of the aforesaid Sections 3, 3(1) and 3(1A) of the Central Excise Act and Rules 7 and 9 of the Central Excise Rules clearly indicates that excise duty is leviable and recoverable only at the point of clearance by producer, manufacturer or curer of any excisable goods or by the person who stores such goods in a warehouse. It is not the case of the Department nor there is any finding to this effect by the authorities below that the railway, who auctioned the discarded rails etc. to the petitioners, was manufacturer, producer and curer of the goods auctioned by it. Even if for the argument sake it is assumed that the goods were manufactured by railway the same could not have been cleared for consumption by themselves without payment of excise duty as is evident from reading of Rule 9. In the circumstances and in view of the aforesaid provisions of law there was no occasion for the authorities below to presume that the goods were non-duty paid. They shall have to be deemed duty paid at the time when the same were used by the railway or when the same were auctioned. No duty is leviable at the time of sale of excisable goods after the same have been used by the party concerned. Entry No. 73.02 of Chapter 73 of the Central Excise Tariff Act, 1985 reads as follows:

Railway or tramway track construction material of iron or steel, the following : Rails, check-rails and rack rails, switch blades, crossing frees, point rods and other crossing pieces, sleepers (cross-ties), fishplates, chairs, chair wedges, sole plates (base plates), rail clips, bedplates, ties and other material specialized for jointing or fixing rails.

The aforementioned materials are used in construction of railway track, which are excisable goods and cannot be cleared without payment of excise duty. Therefore, the duty paid nature of the railway auction by the railway shall have to be presumed in terms of the Explanation to the Notification aforesaid, which reads as follows:

Explanation - For the purposes of this notification all stocks of inputs in the country except such stocks as are clearly recognizable as being non-duty paid, shall be deemed to be inputs on which the duty has already been paid.

10. From perusal of the explanation to the aforesaid notification it is clear that the burden of establishing that the inputs were non-duty paid and the petitioners were, therefore, not entitled to the benefit of the notification as aforesaid shall be on the Department failing which their duty paid character shall be presumed

or deemed to be inputs on which the duty has already been paid. Thus, there is substance in the submission of Sri A.P. Mathur that the onus was on the Department to prove that the goods have not suffered duty or that the same are recognizable being non-duty paid. Mere auctioning by the railway the discarded rails etc. would not automatically lead to the inference that the same were clearly recognizable as deemed non-duty paid - The authorities misdirected themselves in holding that since the railway was not registered with the Central Excise Department, the sale by it through auction cannot lead to the inference that the goods auctioned were duty paid. The benefit of Notification was wrongly denied to the petitioners.

16. This Court held that there was no occasion for the authorities below to presume that the goods were not duty paid. It has further submitted that against the judgment of this Court in Laxmi Rolling Mills & Others (supra) a Special Leave to Appeal (Civil) No. 19555 and 19557 of 2002 was filed which was dismissed by the Apex Court vide its order dated 25-3-2003 [2003 (157) E.L.T. A137 (S.C.)].

17. The learned counsel for the applicant has also rightly relied upon the judgment in Vivek Re-Rolling Mills (supra). The Apex Court also considered the same notification dated 20-5-1988, the old and used railway material was used as inputs in the said case. The Apex Court laid following in paragraph 2 of the judgment.

The appellants claimed benefit of exemption under Notification No. 202/88-C.E., dated May 20,1988. The said notification exempts goods of the description specified in column (3) of the Table annexed thereto and falling within Chapter 72, Chapter 73 or Heading No. 84.54 of Schedule to the Central Excise Tariff Act, 1985 from the whole of the duty of excise leviable thereon which is specified in the said Schedule, when the final products are made from any goods of description specified in the corresponding entry in column (2) of the said Table. Such goods are referred to as ''inputs''. There is yet another condition that the inputs should have suffered the duty under the said Act. There is no dispute that the inputs have suffered the duty. The only controversy which resulted in denial of benefit of the notification to the appellants from the original authority up to the stage of the Tribunal is that the inputs used by the appellant for manufacture of finished product, do not answer the description of the goods specified in column (2). The appellants are using old and used railway materials as inputs for manufacturing the final products, namely, bars and M.M. Rounds/Squares. The appellants have, however, maintained that the inputs used by them are nothing but angles, shapes and sections of iron of non-alloy steel (other than slotted angles and slotted channels) which are specified in column (2).

18. The learned counsel for the appellant has also placed before us the orders of the Tribunal dated 12-1-2004 extending the benefit of notification dated 20-5-1998 after considering the judgment of the Apex Court in Vivek Re-Rolling Mills (supra) and Laxmi Rolling Mills & Others (supra).

19. The judgment which have been relied by Shri R.C. Shukla in Machine Builders (supra) was not a case where notification dated 20-5-1988 was under consideration nor inputs in the said case was auctioned material in old railway track.

20. We failed to see that how the said judgment was relevant for the Tribunal to follow while dismissing the appeal of the applicant. The case of the applicant is fully covered by the order of the judgment of this Court in Vivek Re-Rolling Mills (supra) and Laxmi Rolling Mills & Others (supra).

21. In view of the aforesaid discussions, we answer all the questions as indicated above in favour of the applicant and against the department. The reference is answered accordingly.

