

(2013) 02 BOM CK 0008

In the Bombay High Court

Case No : Central Excise Appeal No. 38 of 2013

R.R. Paints Pvt. Ltd.

APPELLANT

Vs

Commissioner of C. Ex., Mumbai-III

RESPONDENT

Date of Decision : 25-02-2013

Acts Referred:

Citation : (2014) 33 STR 156

Hon'ble Judges : D.Y. Chandrachud, J;A.A. Sayed, J

Bench : Division Bench

Advocate : S.P. Mathew instructed by V.M. Doiphode and Co, for the Appellant;
Pradeep S. Jetly and Ms. Annie Fernandes, for the Respondent

Judgement

1. This Appeal u/s 35G of the Central Excise Act, 1944 arises from a decision of the CESTAT dated 15 June, 2012 (2013 (288) ELT 289). A notice to show cause was issued to the Appellant on 28 April, 2009. The notice alleged that the Appellant was manufacturing exempted as well as dutiable goods and had availed of the Cenvat facility for the payment of duty. Under Rule 6(2), where a manufacturer or service provider is engaged in manufacturing dutiable as well as exempted goods, he is required to maintain separate accounts for the receipt, consumption and inventory of input and input services meant for use in the manufacture of dutiable final products or in providing output service from those meant for use in the manufacture of exempted goods or services. If the manufacturer does not keep separate accounts in respect of dutiable and exempted goods, Rule 6(3)(b) provides for payment of 10% of the total price of the exempted goods. Two notices to show cause were issued. One notice to show cause dated 28 April, 2009 made a demand in the amount of Rs. 4,77,390/-. The extended period of limitation was invoked on the ground that the Appellant had with an intent to evade payment of central excise duty, willfully suppressed facts from the Department justifying a recourse to the proviso to Section 11A. The Appellant was called upon to show cause against the levy of penalty and interest. Another show cause notice dated 28 April, 2009 was issued for a demand of Rs.

3,00,301/-. In that case, recourse to the extended period of limitation was not necessary. The Appellant submitted its reply questioning the invocation of the extended period of limitation. An order of adjudication was passed confirming the demand in the amount of Rs. 7,77,691/- equivalent to 10% of the total price of exempted goods under Rule 6(3) of the Cenvat Credit Rules, 2004 together with interest, and a penalty of Rs. 20,000/- which was imposed on the Appellant. An Appeal was dismissed by the first Appellate Authority against which the Appellant moved the CESTAT. The CESTAT has maintained the order of adjudication as confirmed in appeal, save for deletion of the penalty which was imposed on the Appellant.

2. Counsel appearing on behalf of the Appellant submits that while deleting the penalty that was imposed on the Appellant, the Tribunal has come to the conclusion that there was no intention to evade payment of duty. Hence, it was urged that having regard to this finding, recourse to the extended period of limitation under the proviso to Section 11A was not warranted. On the other hand, the learned counsel appearing on behalf of the Revenue submitted that the penalty that was imposed on the appellant was under Rule 15(3) of the Cenvat Credit Rules, 2004. As a matter of fact, the Revenue would be aggrieved by the order of the Tribunal interfering with the penalty that was imposed, but in the facts of the case, no appeal has been filed by the Revenue, having regard to the quantum involved. However, it was urged that invocation of the extended period of limitation in respect of the first show cause notice was validly made and no interference in the Appeal is warranted.

3. The order of adjudication passed by the Assistant Commissioner on 30 March, 2010 notes that it was not disputed that the Appellant was manufacturing dutiable as well as exempted goods and while availing of Cenvat credit, the Appellant had not maintained a separate account as required by Rule 6(2). The Appellant had suppressed the fact of not having maintained a separate account as required. On this ground, the extended period of limitation was invoked and the Appellant was held liable to pay an amount equal to 10% of the total price of the exempted final product as required by Rule 6(3)(b). The first appellate authority confirmed the order. When the matter was carried in appeal to the CESTAT from the order of the first Appellate Authority, the order of the Tribunal noted the submission of the Appellant that it was a fact that the Appellant had not maintained separate accounts on the input service used in or in relation to the manufacture of exempted final products and dutiable final products during the period from 2006-07 to 2008-09. However, the submission which was urged at the hearing was that Service Tax credit attributable to the dutiable product works out to Rs. 5.45 lakhs whereas the amount of credit attributable to exempted goods was only Rs. 32,398/- in respect of which the Appellant was asked to pay a sum of Rs. 7.77 lakhs being 10% of the price of the goods cleared. The Tribunal has dealt with this submission, holding that by an amendment by the Finance Act, 2010, provision was made to the effect that a person who has availed of credit wrongly may make an application to the

Commissioner of Central Excise together with documentary evidence and a certificate of a Chartered/Cost Accountant within six months from the date on which the Bill receives the assent of the President. On such an application being made, the Commissioner was empowered to call upon the applicant to pay the differential amount together with interest which was required to be paid within ten days from the receipt of the communication. The Tribunal noted that the Appellant had not taken recourse to this procedure nor had it reversed the Cenvat credit. The time limit stipulated expired in November, 2010. Hence, the material before the Tribunal was sufficient to indicate that admittedly the Appellant produced dutiable and exempted products. Though it failed to maintain a separate account in respect of the input service utilized in or in relation to the dutiable and exempted final products as required by Rule 6(2), this fact was suppressed from the Department with the intent to evade duty. As the order of the Tribunal would indicate, the challenge to the finding of the adjudicating authority and of the first Appellate Authority in regard to the invocation of the extended period of limitation was not pressed at the hearing and the only submission which was urged was in regard to the proportion of the Cenvat credit relatable to the exempted products. This was answered by the Tribunal, as noted earlier, by holding that the Appellant had failed to avail of the facility which was available under the amended provisions of the Finance Act, 2010. The Tribunal while deleting the penalty has made a passing observation to the effect that there was no intention to evade payment of duty. This, however, does not in any way nullify or negate the principal finding of the adjudicating authority and the first Appellate Authority which has been confirmed by the Tribunal. In these circumstances, the Appeal will not give rise to any substantial question of law and shall accordingly stand dismissed. No order as to costs.