
(2009) 08 P&H CK 0119
In the Punjab And Haryana At Chandigarh

The Commissioner, Central Excise

APPELLANT

Vs

Nestle India Limited

RESPONDENT

Date of Decision : 11-08-2009

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 11AC, 35G

Citation : (2009) 169 ECR 61 : (2010) 250 ELT 341 : (2009) 23 STT 210

Hon'ble Judges : M.M. Kumar, J;H.S. Bhalla, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

M.M. Kumar, J.—The revenue has filed the instant appeal u/s 35-G of the Central Excise Act, 1944 (for brevity, "the Act") against the order dated 16.12.2003 passed by the Customs Excise and Service Tax Appellate Tribunal, New Delhi (for brevity, "the Tribunal").

2. On 10.8.2006, the Division Bench admitted the instant appeal and directed the same to be listed along with C.E.A. No. 1 of 2006, wherein the following questions of law were framed for determination of this Court:"

1. Whether Tribunal is justified in vacating the demand when it has been proved on the record that party was availing Modvat credit on the inputs namely Residual Furnace Oil (R.F.O.) used as input for generation of steam used for manufacturing of dutiable as well as exempted goods and party was not maintaining any separate accounts of the said inputs being used in manufacture of exempted goods as per provisions of Rules 57CC(9)?

2. Whether party is liable to pay an amount of Rs. 1,79,52,77,469/-(Rupees one crore seventy nine lakh (sic) only) which is equivalent to 8% of the price of said exempted goods in terms of Rule 57CC(9) of the rules, which include the credit of Rs. 1,80,49,568/-(Rupees one crore eighty lakh forty nine thousand five hundred sixty eight only)?

3. M/s Nestle India Ltd., Moga-respondent No. 1 is engaged in the manufacture of excisable goods. The dutiable products manufactured by respondent No. 1 are, namely, (a) Sweetened Condensed Milk; (b) Noodles; and (c) Nescafe. Certain excisable goods being manufactured by the assessee-respondent No. 1 were exempted from whole of the duty of excise. The products exempt from payment of excise duty or are chargeable to no duty of excise are (i) Baby Foods; (ii) Milk Powder; (iii) Ghee; and (iv) Sauces and Soups. It was availing Modvat credit of duty paid on inputs used in or in relation to the manufacture of excisable goods under Rule 3 of the Cenvat Credit Rules, 2001 (for brevity, "the Rules"). At the time of their visit to the factory premises of the assessee-respondent No. 1, the Range Staff noticed that the assessee-respondent No. 1 was availing Modvat Credit on inputs known as Residual Furnace Oil (RFO) falling under Chapter 27 of the first schedule of the Central Excise Tariff Act, 1985 (for brevity, "the 1985 Act"). The RFO/Furnace Oil is purchased by them on payment of excise duty. The RFO was being used for generation of steam within the factory premises, which was used for manufacture of dutiable as well as exempted excisable final products or the goods charged to nil rate of duty. It is noteworthy that the entire steam generated by using RFO as fuel is used by them in the manufacturing process only and no part of the steam so generated is used by respondent No. 1 for any other purpose whatsoever. This factual position is undisputed. Accordingly respondent No. 1 has been availing Modvat Credit on the duty paid on RFA right from 1994. It was also found that the assessee-respondent No. 1 was not maintaining any separate records of the said inputs being used in the manufacture of exempted goods or goods charged to nil rate of duty as required under Rule 6(2) of the Rules, which was applicable at that point of time. It is the case of the revenue that from 1.7.2001 to 31.8.2001, the assessee-respondent No. 1 had cleared goods chargeable to nil rate of duty or exempt from the whole of the duty of excise in which common inputs had been used but for which no separate accounts had been maintained. Accordingly, it was liable to pay an amount equivalent to 8% of the price of the said exempted goods in terms of Rule 6(3)(b) of the Rules.

4. The revenue-appellant issued show cause notice No. V (19&21)15/CE/28/Comm. Adj./CHD-II/2002/883-885, dated 1.8.2002, under Rule 12 of the Rules read with Section 11A of the Act, raising a demand for payment of duty of Rs. 9,03,96,037/-. The revenue-appellant also proposed penal action under Rule 25(a)(b)& (d) and 27 of the Central Excise Rules, 1944 (for brevity, "the Excise Rules") as well as under Rule 12 and 13 of the Rules for contravention of the provisions of Rule 6 of the Rules. The appellant also proposed payment of interest u/s 11AB of the Act.

5. On 24.7.2003, the Commissioner, Central Excise, Ludhiana, passed a detailed order and also ordered for recovery of Rs. 6,24,731/-i.e. the entire amount of the Modvat/Cenvat credit availed by the assessee-respondent No. 1 on RFO as common input, which was used for manufacture of dutiable and exempted goods under Rule 12 of the Rules read with Section 11A of the Act. An amount of Rs.

2,86,55,296/-was ordered to be adjusted against the aforesaid amount, which had been debited by the assessee-respondent No. 1. The Commissioner also imposed a penalty of Rs. 6,24,731, which was equal to disallowed credit as provided under Rule 13(2) of the Rules read with Section 11AC of the Act. Charging and appropriation of interest under Rule 12 of the Rules read with Section 11AB of the Act was also ordered. However, in view of Board's Circular F. No. 591/28/2001-CX, dated 16.10.2001, the Commissioner has confirmed the demand of Rs. 1,80,49,568/-only and the remaining demand of Rs. 1,77,72,27,901/-was deemed to have been dropped (A-1).

6. Against the order dated 24.7.2003 (A-1) passed by the Commissioner, the assessee-respondent No. 1 preferred an appeal before the Tribunal. The Tribunal has allowed the appeal in terms of its final order dated 11.12.2003, earlier passed in the case of the assessee-respondent No. 1 itself, bearing Appeal No. E/1590/2003NB(a) & E/M/359/2003-NB(A), and set aside the order passed by the Commissioner by observing as under:

3. It is seen that the Commissioner rejected the contention raised by the assessee on the basis of the decision of the Larger Bench of this Tribunal in 2000 (91) ECR 263 on the ground that in the facts of the above case the inputs used for generation of electricity was in turn used for manufacture of excisable goods whereas in the present case steam produced out of RFO is used in the manufacture of both dutiable and exempted goods. The appellants are fully justified in contending that the credit cannot be denied even if the steam is utilised for manufacture of exempted final products also in the light of the proviso inserted to Rule 57A w.e.f. 18.5.95. The above proviso reads as follows:

Provided also that the credit specified duty shall be allowed in respect of inputs which are used for generation of electricity or steam, used for manufacture of final products or for any other purpose within the factory of production.

In Navsari Oil Products Ltd. v. CCE Surat 1993 (53) RLT 96 we have taken the view that words "for any other purpose within the factory of production" would take in manufacturing non-dutiable items also. The ratio of the above decision is directly applicable to the facts of the present case.

4. In the light of the above, we set aside the order impugned and allow the appeal.

7. The aforementioned order passed by the Tribunal is subject matter of challenge in the instant appeal.

8. Having heard learned Counsel for the parties and perusing the paper book with their able assistance we are of the considered view that there is no merit in the instant appeal and the same deserves to be dismissed. The controversy in the instant appeal centres around the issue as to whether the assessee-respondent No. 1 is entitled to the Modvat/Cenvat credit on the use of RFO for generation of steam, which was used for the manufacture of the final products

both exempted and dutiable as required under the provisions of Rule 6 of the Rules. At the outset it would be profitable to read Sub-rule (1) and (2) of Rule 6 of the Rules, which are extracted as under:

6. Obligation of manufacturer of dutiable and exempted goods. - (1) The CENVAT credit shall not be allowed on such quantity of inputs which is used in the manufacture of exempted goods, except in the circumstances mentioned in Sub-rule (2).

(2) Where a manufacturer avails of CENVAT credit in respect of any inputs, except inputs intended to be used as fuel, and manufactures such final products which are chargeable to duty as well as exempted goods, then, the manufacturer shall maintain separate accounts for receipt, consumption and inventory of inputs meant for use in the manufacture of dutiable final products and the quantity of inputs meant for use in the manufacture of exempted goods and take CENVAT credit only on that quantity of inputs which is intended for use in the manufacture of dutiable goods.

9. A bare perusal of the above provisions shows that a manufacturer of both dutiable and exempted goods is entitled to avail Cenvat credit on such quantity of inputs which is used in the manufacture of exempted goods except the circumstances mentioned in Sub-rule (2), which contemplates that where a manufacturer avails the Cenvat credit in respect of any inputs, except inputs intended to be used as fuel, and manufactures such final products which are chargeable to duty as well as exempted goods then he would be required to maintain separate accounts for receipt, consumption and inventory of inputs meant for use in the manufacture of dutiable final products and the quantity of inputs meant for use in the manufacture of exempted goods and take Cenvat credit only on that quantity of inputs which is intended for use in the manufacture of dutiable goods. In the present case, it is not in dispute that the assessee-respondent

10. No. 1 has used the RFO as fuel only and not for any other purpose. Rule 6 of the Rules is *pari materia* with Rule 57CC of the erstwhile Excise Rules. The relevant provision of Rule 57CC of the Excise Rules is reproduced as under for the facility of reference:

57CC. Adjustment of credit on inputs used in exempted final products or maintenance of separate inventory and accounts of inputs by the manufacturers: (1) Where a manufacturer is engaged in the manufacture of any final product which is chargeable to duty as well as in any other final product which is not chargeable to duty and the manufacturer takes credit of the specified duty on any inputs (other than inputs used as fuel) which is used or ordinarily used in or in relation to the manufacture of both the aforesaid categories of final products, whether directly or indirectly and whether contained in the said final products or not, the manufacturer shall, unless the provisions of Sub-rule (9) are complied with, pay an amount equal to eight per cent of the price (excluding sales tax and

other taxes, if any, payable on such goods) of the second category of final products charges by the manufacturer for the sale of such goods at the time of their clearance from the factory.

xxxx xxx xxxx xxx (9) In respect of inputs (other than inputs used as fuel) which are used in or in relation to the manufacture of any goods, which are exempt from the whole of the duty of excise leviable thereon or chargeable to Nil rate or duty, the manufacturer shall maintain separate inventory and accounts of the receipt and use of inputs for the aforesaid purpose and shall not take credit of the specified duty paid on such inputs.

11. It is apposite to notice here that the issue is no longer *res integra* and is squarely covered by a Division Bench judgment of this Court (of which one of us M.M. Kumar, J. was a member) rendered in the case of *CCE v. Super Auto (I) Ltd.* 2008 (221)ELT 41 (P&H) wherein after considering Rule 57CC of the Excise Rules it has been held that in cases where inputs are intended to be used as fuel, the provision of Sub-rule (9) of Rule 57CC of the Excise Rules would not apply and the assessee would be entitled to avail credit of fuels even though part of it is used to manufacture of exempted final products. Moreover, we have already dismissed other appeals filed by the revenue-appellant, namely, CEA Nos. 1, 42, 48 and 62 of 2006 against various identical orders passed by the Tribunal, vide detailed judgment dated 3.2.2009 passed in CEA No. 1 of 2006. Therefore, following the same reasoning and principle of law, especially when Rule 6 of the Rules is *pari material* with Rule 57CC of the erstwhile Excise Rules, we have no other option but to dismiss the instant appeal.

12. The argument of Mr. Sehgal is that separate inventory and accounts of the receipts and use of inputs for the aforesaid are required to be maintained. According to him if something is required to be done by the statute in a particular fashion then benefit could be granted only if it has been done in that fashion. We do not feel persuaded to accept the submission made. Sub-rule (2) of Rule 6 in unmistakable terms excludes "the inputs which are included to be used as fuel". The expression used in this rule is even wider than sub-rule (9) of Rule 57CC of the Excise Rules, which employed the expression "other than inputs used as fuel". Under Sub-rule (2) of Rule 6 even those inputs are excluded which are intended to be used as fuel whereas in the sub-rule 9 of Rule 57CC the words are "inputs used as fuel". Therefore, Sub-rule (2) of Rule 6 expanded the scope of exemption and the judgment rendered in CEA Nos. 1, 42, 48 and 62 of 2006 on 3.2.2009 would be fully applicable.

13. In view of the above discussion, this appeal fails and the same is hereby dismissed.