
(2015) 04 AP CK 0022

In the Andhra Pradesh High Court

Case No : Central Excise Appeal No. 24 of 2004

The Commissioner, Customs and Central Excise

APPELLANT

Vs

Surana Telecom Limited

RESPONDENT

Date of Decision : 30-04-2015

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B, 11-B, 12A, 35(G), 5A

Citation : (2015) 325 ELT 281 : (2015) 52 GST 796

Hon'ble Judges : D.B. Bhosale, J;A. Ramalingeswara Rao, J

Bench : Division Bench

Advocate : Jalakam Satyaram, Standing Counsel, for the Appellant; S. Ravi, Advocates for the Respondent

Judgement

A. Ramalingeswara Rao, J.—This Central Excise Appeal is filed under Section 35(G) of the Central Excise Act, 1944 (for short, the Act) against the order of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Bangalore (for short, the Tribunal) in Final Order No. 680/2004 dated 25.03.2004 in Appeal No. E/467/2000.

2. The following substantial questions of law were framed and fell for our consideration.

"a) Whether duty paid through Modvat Credit account on the clearances of cable jointing kits prior to their exemption from excisability as held by Hon"ble High Court of AP can be granted as refund, even though the refund claim was barred by limitation of time under Section 11B of Central Excise Act, 1944?

b) Whether Modvat credit be allowed on the inputs used in the exempted final products i.e., cable jointing kits as against the provisions of Rule 57F of Central Excise Rules, 1944?

c) Whether modvat credit accrued on inputs that go into the manufacture of exempted cable jointing kits and used for payment of duty on clearances of such kits can be allowed against the provisions of Rule 57F of Central Excise Rules,

1944?"

3. The respondent assessee is in the business of manufacture of cable jointing kits falling under chapter sub-heading No. 8547.00 of Central Excise Tariff Act, 1985. The assessee paid the excise duty of an amount of Rs. 1,01,92,689/- out of which an amount of Rs. 95,56,264/- was allegedly paid under protest, whereas an amount of Rs. 6,36,425/- was paid in respect of supplies made to others. The said amount of Rs. 95,56,264/- was paid on the goods cleared to Department of Telecom which was not reimbursed by the Department of Telecom and the details of duty paid are as follows:

"BREAK UP OF DUTY PAYMENT PARTICULARS

4. After payment of the duty as aforesaid, this Court in W.P. Nos. 8818, 22078 and 24242 of 1997, dated 02.02.1998, held that assembly of cable jointing kits does not amount to manufacture. On the basis of the said judgment, the assessee staked a claim that no excise duty is leviable on the said cable jointing kits and hence the duty paid through RG 23A Part II (Modvat Credit) is to be refunded to them as the incidence of duty has not been passed on to the customer. They filed a refund claim for Rs. 1,01,92,689/- being the duty paid on clearances effected from 15.10.1996 to 28.08.1997. The Assistant Commissioner of Central Excise, Hyderabad X Division, vide Adjudication Order No. 24/98 dated 08.05.1998, rejected the refund claim as being time barred on the ground that the protest letter, as required under Rule 233B of the Central Excise Rules, 1944 (for short, the Rules), was filed before the Superintendent of Central Excise and not before the Assistant Commissioner who is a proper officer under the said Rule and also on the ground that the assessee had not furnished any documentary evidence from the buyer to the effect that they have not reimbursed excise duty from the assessee. Against the said order, the assessee went in appeal to the Commissioner of Customs and Central Excise, (Appeals), Hyderabad, who in his order in Appeal No. 35/99 (H.III) CE dated 04.03.1999, set aside the order of the Assistant Commissioner and remanded back the matter to the Assistant Commissioner for de novo decision, as he passed the order without following the principles of natural justice.

5. Accordingly, the assessee was given an opportunity of personal hearing on 15.04.1999. The assessee submitted that the Superintendent of Central Excise instructed him on 05.09.1996 stating that the jointing kits are falling under Chapter Heading No. 8947.00 and hence a declaration under Rule 173B had to be filed, the procedures have to be followed and the duty should be paid. In those circumstances, the protest letter was addressed on 14.10.1996 stating that duties were paid under protest. Later on, the decision of this Court dated 02.02.1998 was pronounced. The assessee submitted that it complied with the procedure for lodging the protest and accordingly requested for refund. It also submitted that whether a protest is lodged with the Superintendent or the Assistant Commissioner, it would only be a letter of protest under Rule 233B. The Assistant Commissioner rejected the refund claim for Rs. 95,56,264/- on the

ground that it was time barred, the assessee had not filed the letter of protest before the proper officer and Sub-rule (13) of Rule 57F of the Rules does not allow any cash refund for duty credited under RG 23A Part II account except when the goods are exported on payment of duty. Against the said order, the assessee preferred an appeal to the Commissioner of Customs and Central Excise (Appeals), Basheerbagh, Hyderabad, who in his order dated 06.12.1999, held that there was protest payment of duty by the assessee and there was substantial compliance of Rule 233B of the Rules and the claim was not hit by time bar. It was held that since the Department of Telecom vide its letter dated 10.07.1998 had certified that they have not reimbursed excise duty for the supply bills raised against the purchase order C 96/JKits/8216/8, dated 29.11.1996, the assessee was entitled to the refund of Rs. 3,45,548/- paid from the PLA for the supplies effected to the Department of Telecom against the said purchase order. The refund of the modvat credit of Rs. 65,41,683/- and Rs. 26,69,033/- was held to be disallowed as there is no provision in law for restoration of the credit once utilized in such a situation. Thus, he modified the order of the Assistant Commissioner. Against the said order, the assessee preferred an appeal to the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Tribunal, Bangalore (for short, the Tribunal), which allowed the appeal of the assessee based on a final order No. 1183/2002 dated 06.09.20012 passed in the case of Goldstone Engineering Ltd. Vs. CCE, by holding as follows:

"4. We have heard both sides and considered the matter and find that:-

a) Payment of duty by debiting RG23A Part II is also payment of duties levied under the Central Excise Act, 1944. When the Hon"ble High Court held that the cable jointing kits are not exigible and no manufacture is involved in placing or articles in one kit and the SLPs filed by the Department on the same issue have been dismissed by Hon"ble Supreme Court, then there was no case ab initio for levy of any duty under the Central Excise Act, 1944. If such a duty was levied and or recovered the same is required to be refunded. Duties which have been discharged by debit in RG23A Part II, are therefore required to be restored in the RG23A Part II registers, by a reversal of entry in the said registers. We agree with the plea made by the Ld. Consultant that if the appellants are not eligible for the credit on the inputs per se the kits, i.e., final product, for which the inputs were brought and used have been held to be non-excisable, then a separate proceedings for denial of the modvat credit not admissible should have been launched. We agree with the propositions so made.

5. In view of our findings and seeing there are no other issues raised in the appeal before us, we would modify the Commissioner's orders by directing that the RG23A Part II records should be ordered to be credited with the debits of duty made in the RG23A registers, thereafter the Department is at liberty to take such action as permissible under law to deny the availment of modvat claim. This appeal is therefore disposed off in the above terms.

6. It is submitted by the learned Standing Counsel for the Revenue that no

appeal was preferred against the Final Order No. 1183/02 dated 06.09.2002 passed in case of Gold Stone Engineering Limited. He further submitted that RG23A Part II records cannot be debited and there is no provision for refund of duty credited in RG23A Part II Account except when the goods are exported on payment of duty.

7. The learned counsel for the assessee, on the other hand, submitted that the Commissioner of Customs and Central Excise (Appeals), Basheerbagh, Hyderabad held that there was a protest within the meaning of Rule 233B of the Rules and the claim for refund was not time barred. When the Commissioner held that the assessee was not entitled to the modvat credit of Rs. 65,41,683/- and Rs. 26,69,033/-, the matter went in appeal before the Tribunal and the Tribunal, based on its previous order, held in favour of the assessee. It is not open to the Revenue to challenge the order of the Tribunal, when the earlier order of the Tribunal on which it was based, had become final.

8. Section 11-B of the Act deals with claim for refund of duty and Sub-section (1) thereof at the relevant time reads as follows:

"(1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of six months from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in Section 12A) as the applicant may furnish to establish that the amount of duty of excise in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty had not been passed on by him to any other person:

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991 (40 of 1991), such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) substituted by that Act:

Provided further that the limitation of six months shall not apply where any duty has been paid under protest.

Explanation:--For the purposes of this section,

(A) "refund" includes rebate of duty of excise on excisable goods exported out of India or an excisable materials used in the manufacture of goods which are exported out of India;

(B) "relevant date" means,-

(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods,-

- (i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or
- (ii) if the goods are exported by land, the date on which such goods pass the frontier, or
- (iii) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India;
- (b) in the case of goods returned for being remade, refined, reconditioned, or subjected to any other similar process, in any factory, the date of entry into the factory for the purposes aforesaid;
- (c) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside India, if returned to a factory after having been removed from such factory for export out of India, the date of entry into the factory;
- (d) in a case where a manufacturer is required to pay a sum, for a certain period, on the basis of the rate fixed by the Central Government by notification in the Official Gazette in full discharge of his liability for the duty leviable on his production of certain goods, if after the manufacturer has made the payment on the basis of such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction;
- (e) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;
- (ea) in the case of goods which are exempt from payment of duty by a special order issued under sub-section (2) of Section 5A, the date of issue of such order."

9. A reading of the above provision makes it clear that if the duty was paid under protest, the limitation of six months shall not apply.

10. In the instant case, it is clear that on the instructions of Superintendent of Central Excise, a declaration under Rule 173B was filed and the duty was paid. It is stated by the assessee that the said duty was paid under protest letter addressed on 14.10.1996, but the said protest letter was addressed to the Superintendent of Central Excise, which was acknowledged by him on the same day. The Superintendent is not the proper officer in terms of Rule 233B of the Rules, as the proper officer was notified as Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise. The relevant portion of Rule 233B reads as follows:

"233B. Procedure to be followed in cases where duty is paid under protest:--(1) Where an assessee desires to pay duty under protest he shall deliver to the proper officer letter to this effect and give grounds for payment of the duty under protest.

(2) On receipt of the said letter, the proper officer shall give an acknowledgement

to it.

.....

(8) If any of the provisions of this rule has not been observed, it shall be deemed that the assessee has paid the duty without protest.

Note:--A letter of protest or a representation under this rule shall not constitute a claim for refund."

11. In *Maneklal Harilal Mills Ltd. V. Collector of C. Ex.* 1997 (95) ELT 217 , the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi held that the protest filed with the Superintendent in favour of Assistant Collector is a substantial compliance of the provisions of Rule 233B of the Rules and that the limitation period under Section 11B of the Act is not attracted as duty was paid under protest. In the said judgment, the Tribunal followed its earlier judgment in *Collector of Central Excise, New Delhi V. Unik Spring (I), Faridabad* 1995 (77) DLT 407, for coming to the said conclusion.

12. In *D.C.M. Data Products V. Collector of Central Excise* 1993 (66) ELT 635 , a three Judge Bench of the Customs, Excise and Gold (Control) Appellate Tribunal Special Bench "A", New Delhi held that so long as there is a substantial compliance with Rule 233B, it does not affect the refund claim. For coming to the said conclusion, the said Tribunal relied on the decision of the Bombay High Court in *Roche Products Ltd. Vs. Union of India*, (1991) 33 ECR 58 : (1991) 51 ELT 238 .

13. The Supreme Court of India had also an occasion to consider the issue of limitation in relation to refund in *India Cements Ltd. Vs. Collector of Central Excise*, AIR 1989 SC 1496 : (1989) 22 ECC 284 : (1989) 25 ECR 477 : (1989) 41 ELT 358 : (1989) JT 137 Supp : (1989) 1 SCALE 1058 : (1989) 2 SCC 676 : (1989) 2 SCR 715 : (1989) 2 UJ 142 , and held that a simple letter of pretest would constitute a protest within the meaning of Rule 233B and hence the question of limitation does not arise for refund of duty.

14. Be that as it may, in the present case, the Commissioner of Customs and Central Excise (Appeals), Hyderabad held that there was a protest under Rule 233B and the claim for refund was not time barred. The said finding was not challenged by the Revenue before the Tribunal. Now it is not open for the Revenue to contend that the protest was not before a proper officer and hence the claim for refund was time barred. Such a plea, at this stage, cannot be entertained. Accordingly, we hold the first question against the Revenue and in favour of the assessee.

15. The next point for determination is whether the duty paid through the credit of RG23A Part II account can be ordered to be refunded with debit of the account with liberty to the Department to take action for denial of availment of modvat claim as ordered by the Tribunal. It is clear from the facts that the duty of Rs. 3,45,548/- was paid from the personal ledger account and the rest of the amount

by credit of RG23A Part II account. The said total amount was disallowed by the Assistant Commissioner, whereas the Commissioner, in appeal, allowed to the extent of duty paid from personal ledger account to the tune of Rs. 3,45,548/- only on the ground that the DOT vide its letter dated 10.07.1998 had certified that they have not reimbursed excise duty for the supply bills raised for the said amount and further holding that there is no provision in law for restoration of the credit, once utilized in respect of the balance amount of Rs. 65,41,683/- and Rs. 26,69,033/-.

16. A nine Judge Bench of the Supreme Court in *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*, (2002) 83 ECC 85 : (1997) 68 ECR 273 : (1997) 89 ELT 247 : (1996) 11 JT 283 : (1996) 9 SCALE 457 : (1997) 5 SCC 536 : (1996) 10 SCR 585 Supp : (1998) 111 STC 467, held that all claims for refund should be adjudicated under Section 11B of the Central Excise Act, 1944 and it is not automatic as the claimant has to prove that the burden of duty had not passed on to third party. In the present case, there is no evidence to show that the claimant has discharged such burden. But so far as the amount of Rs. 3,45,548/- is concerned, since the letter dated 10.07.1998 of the DOT was produced, the said amount was allowed.

17. Rule 57F of the Rules deals with the manner of utilization of inputs and the credit allowed in respect of the duties paid thereon. Sub-Rule (13) of Rule 57F reads as follows:

"(13) Where any inputs are used in the final products which are cleared for export under bond or used in the intermediate products cleared for export in accordance with sub-rule (4), the credit of specified duty in respect of the inputs so used shall be allowed to be utilized by the manufacturer towards payment of duty of excise on any final products cleared for home consumption or for export on payment of duty and where for any reason such adjustment is not possible, the manufacturer shall be allowed refund of such amount subject to such safeguards, conditions and limitations as may be specified by the Central Government by notification in the Official Gazette."

18. The modvat credit availed by the assessee was used for payment of excise duty, though under protest and there is no provision for cash refund of such duty paid through modvat credit. It is also relevant to consider Rule 57L of the Rules which says that no credit of money on the inputs used in the manufacture of the final products shall be allowed if the final products are exempt from the whole of the duty of excise leviable thereon or is chargeable to nil rate of duty. In this case, by the time of the judgment of this Court, the duty was paid from the input credits availed by the assessee. Both the authorities concurrently held that those credits cannot be reversed and there is no provision for reversal of the same. But the Tribunal directed that RG23A Part II should be ordered to be credited with the debits of duty made in the RG23A registers and the Department was given liberty to take such action as permissible under law to deny the availment of modvat claim. Since, in the instant case, the said credit was utilized for payment

duty, we do not think it proper to direct the authorities to reverse the entries in RG23A registers by giving them liberty to deny the availment of modvat claim at a later point of time. Such a course of action has no sanction in law. The learned counsel for the assessee also could not show us any provision of law for reversal of entries, as ordered by the Tribunal.

19. In the circumstances, we are of the opinion that the view taken by the Tribunal for reversal of entries in RG23A Registers consequent to the orders of this Court in W.P. No. 22078 of 1997 and batch dated 02.02.1998 is not correct. In view of the same, we hold the substantial questions raised in the appeal in favour of the Revenue and against the assessee.

20. The Central Excise Appeal is, accordingly, allowed. Miscellaneous petitions pending, if any, shall stand closed. There shall be no order as to costs.