(2010) 08 BOM CK 0083

In the Bombay High Court

Case No : Central Excise Appeal No. 79 of 2004

The Commissioner of Central Excise and Custom — APPELLANT

Vs

Alok Enterprises — RESPONDENT

Date of Decision : 24-08-2010

Acts Referred:

Central Excise Rules, 1944 — Rule 12, 173Q, 57A, 57G(1), 57I

Citation : (2010) 259 ELT 333 : (2010) 28 STT 479

Hon'ble Judges : V.C. Daga, J;R.M. Savant, J

Bench : Division Bench

Advocate : None, for the Appellant; P.V. Patankar, instructed by P.P. Patankar, for the Respondent

Final Decision : Dismissed

Judgement

R.M. Savant, J.—The above Appeal is filed challenging the order dated 09th February 2004 passed by the Customs Excise & Service Tax Appellate Tribunal, West Zonal Bench at Mumbai in Appeal No. E/2930/99 Mum by which order the said Appeal filed by the Respondent herein came to be allowed.

2. The question of law which arises for consideration in the above Appeal is gainfully reproduced herein under:

Whether the process of purification and filtration done by the assessee bring out any chemical change in their products Hydrochloric Acid and Sulphuric Acid, and same amount to manufacture?

3. The issue in the above Petition is as regards the eligibility of the Respondent herein for MODVAT credit on inputs used by them for the manufacture of Hydrochloric Acid and Sulphuric Acid. The Respondent herein is engaged in the manufacture of excisable goods falling under Chapter 28 of Central Excise Tariff Act, 1985 and is availing the benefit of Modvat credit under Rule 57A. The Respondent filed a declaration under Rule 57G(1) on 5th June 1995, wherein Hydrochloric acid is treated with resin to purify and the same is packed in

Carboys the department on the ground that the purification and filtration done by the assessee do not bring out any chemical change in the resultant product and hence according to the department the said activity does not amount to manufacturing activity. The Range Superintendent of the Department issued three show cause notices dated 2nd February 1996, 28th February 1996 and 28th February 1996 proposing recovery of the irregular Modvat credit amounting to Rs. 29,476/-, Rs. 39,160/- and Rs. 41,953/- respectively against the clearances effected during July 1995 to August 1995, September 1995 to October 1995 and November 1995 to December 1995 and imposition of penalty under Rule 173Q of Central Excise Rules 1944.

4. The said show causes notices were replied by the Respondent. It is contended in the said reply that they are exporting Hydrochloric acid and Sulphuric acid on payment of Central Excise Duty under claim of rebate as provided under Rule 12 of the Central Excise Act, 1944 (hereinafter referred to as "the Act"). It was further contended that the process of purification and filtration undertaken to make the produce marketable in export market would fall under the definition of manufacture as process incidental or ancillary to it.

The said show cause notices were adjudicated by the Assistant Commissioner, Central Excise, Dombivli Division and vide his order in original dated 20th June 1996 disallowed Modvat credit of Rs. 1,10,589/- availed by the Respondent on the inputs i.e. Hydrochloric acid and Sulphuric acid and thereby confirmed the demand to that effect under Rule 57I of the Central Excise Rules 1944 and imposed penalty of Rs. 20,000/- under the provisions of Rule 173Q of the said Rules.

5. Aggrieved by the said order in original dated 20th June 1996, the Respondent herein filed an Appeal before the Commissioner of Central Excise (Appeals). The Commissioner upheld the said order in original dated 20th June 1996 and rejected the Appeal of the Respondent herein.

Being aggrieved by the said order of the Commissioner, the Respondent herein filed further Appeal before the Customs Excise & Service Tax Appellate Tribunal (hereinafter referred to as "CESTAT"). By the impugned judgment and order dated 9th February 2004, the CESTAT allowed the said Appeal and set aside the order in original as well as the order of the Commissioner of Central Excise (Appeals) by holding that there is no finding in the order in original that the commodity after the operations conducted by the said appellant (respondent in the instant Appeal) did not result in a new commodity, commercially understood by the persons dealing with them. The CESTAT also observed that it is well settled law that even if the goods belong to same entry, manufacture does take place if new identifiable/marketable goods known in market emerge due to operation conducted and that the nature of technology used is not relevant and, hence came to conclusion that MODVAT credit cannot be denied to the Appellants (the Respondent herein). As mentioned herein above, it is the said order which is impugned in the present Appeal.

6. We have heard the learned Counsel appearing for the Respondent Mr. P.V. Patankar. None was present on behalf of the Appellant, though served.

7. The learned Counsel for the Respondent drew our attention to the definition of the word "Manufacture" as contained in Clause 2(f) of the said Act which is reproduced as under:

2(f) "Manufacture" includes any process-

(i) incidental or ancillary to the completion of a manufactured product; and

(ii) which is specified in relation to any goods in the Section or Chapter notes of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to manufacture,

and the word "manufacture" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account.

The learned Counsel for the Respondent submitted that even though the ultimate product of the Respondent remains the same i.e. Hydrocholic acid and Sulphuric acid, there is manufacturing process involved as there is purification and filtration to make the product marketable in the international market and therefore the same would be covered by the term "manufacture" as contemplated in the said Clause 2(f).

8. The learned Counsel for the Respondent relied upon the Judgment of the High Court of Kerala at Ernakulam reported in 1975 E.L.T. (J 520) in the matter of Metro Readywear Co. v. Collector of Customs. In the said judgment it has been held that the process of ironing that was applied to the stitched brassieres prior to their packing was a process incidental to the completion of the brassieres as a manufactured product since the said process was obviously intended to give a finishing touch in order to render them marketable as ready-to-wear undergarments and, since the said process was admittedly being carried out with the aid of power, liability for payment of duty under Item 22D gets attracted.

The said judgment of the High Court of Kerala in the case of Metro Readywear (Supra) was quoted with approval by the Apex Court in the matter of Regional Director, Employees'' State Insurance Corporation Vs. Ram Chander, wherein an identical issue had come up before the Apex Court. Para-6 of the Judgment of the Apex Court wherein the judgment of the High Court of Kerala in the case of Metro Readywear Co. (Supra) is quoted, is reproduced herein under:

6. Our attention was also drawn to the decision of this Court in Hindu Jea Band, Jaipur Vs. Regional Director, Employees'' State Insurance Corporation, Jaipur, , where it was held that it was not that a place where goods were sold was only a shop. A place where services were sold on retail basis was also a shop. The facts of that case were entirely different from these in this case. But the ratio of that

decision is apposite to the issue in dispute here. There this Court reiterated that it was not that aplace where goods were sold was only a shop. But a place where services were sold on retail basis was also a shop. The place of business of a firm carrying on the business of playing music on occasion, such as, marriage and other social functions which made available on payment of the stipulated price the services of the members of the group of musicians employed by it on wages was a shop to which the Act was applicable by virtue of the notification. The fact that the services were rendered by the employees engaged by the firm intermittently or during marriages did not entitle the firm to claim any exemption from the operation of the Act. In Metro Readywear Company Vs. Collector of Customs, of the High Court of Kerala at Ernakulam it was held that the brassieres were undoubtedly undergarments falling within the description "articles of ready-to-wear apparel (known commercially as readymade garments) and therefore was classified under Item 22D of Central Excise Tariff. Ironing with electric iron amounted to a process of manufacture with the aid of power. It was held that ironing of stitched brassieres is incidental or ancillary to their manufacture since the said process was intended to give a finishing touch in order to render them marketable. In our opinion the ratio or the reasoning of the said decision is applicable to the facts of this case.

9. Relying upon the said judgment in the case of Metro Readywear (Supra), the learned Counsel for the Respondent contended that since the process of purification and filtration being incidental or ancillary to the manufacture of a marketable product, the Respondent was entitled to Modvat credit on the inputs involved in the said process.

10. Having considered the judgment of CESTAT, in our view, the view taken by the CESTAT cannot be faulted with. In that view of the matter, we do not find any merit in the above Appeal and by answering the question of law in negative i.e. in favour of the assessee the same is accordingly dismissed. No order as to costs.

