

(2010) 03 KAR CK 0084
In the Karnataka High Court
Case No : C.E.A. No. 51 of 2007

The Commissioner of Central Excise and S.T., Large Tax Payer Unit APPELLANT

Vs

Suprajit Engineering Ltd., Unit-II RESPONDENT

Date of Decision : 12-03-2010

Acts Referred:

CENVAT Credit Rules, 2002 — Rule 4 (2) (b), 4 (4)
Income Tax Act, 1961 — Section 32

Citation : (2010) 03 KAR CK 0084

Hon'ble Judges : K.L. Manjunath, J;H.S. Kempanna, J

Bench : Division Bench

Advocate : Y. Hariprasad, for the Appellant; Vijaya Prakash, for G. Sampath and S. Raghu, for the Respondent

Final Decision : Allowed

Judgement

K.L. Manjunath, J.—This appeal is by the revenue challenging the order passed by CESTAT, South Zone Bench, Bangalore in Final Order No. 1854 & 1855/2006 dated 8.11.2006, raising the following substantial question of law.

Whether the Tribunal was right in arriving at decision that the assessee availed Cenvat Credit during second year as per Rule 4(2)(b) of Cenvat Credit Rules and further the finding of the tribunal that there is no bar under Rule 4(4) of the Rules to claim the depreciation of the balance 50% of the value of the capital goods which represents the duty u/s 32 of the Income Tax Act, without noticing the show cause notice, wherein it is stated that the assessee has availed the second 50% of the value of the capital goods in respect of which Cenvat Credit availed from all the units and the same is contrary to Rule 4 of said Rules?

2. Facts leading to this case are as hereunder:

Respondent-assessee is having its factory at Bommasandra Industrial Area, engaged in the manufacture of excisable goods falling under heading Nos. 8714,

8483, 8708 and respondent is availing Cenvat Credit of duty paid on inputs/capital goods. During 2000-01 assessee purchased capital goods and availed 50% of Cenvat credit on capital goods as per the prevailing rules and it had also availed depreciation u/s 32 of IT Act in respect of the remaining 50% of Cenvat Credit which was not availed by it. For the next financial year on the un-availed 50% claimed benefit. Revenue having noticed that the assessee claiming depreciation under the Income Tax Act and also availing Cenvat credit in respect of un-used 50% in the previous year, issued a show cause notice calling upon the respondent-assessee to pay duty and also to pay interest and penalty. A reply was sent by the assessee and thereafter jurisdictional Deputy Commissioner passed an order on 30.7.2004 stating that the assessee had availed credit amounting to Rs. 1,62,926/- and imposed penalty of Rs. 25,000/- and demanded interest under Rule 12 of Cenvat Credit Rules R/w Section 11AB of the Central Excise Act. Being aggrieved by the order of the Deputy Commissioner, assessee filed an appeal before the Commissioner of appeals which appeal also came to be dismissed on 31.3.2005. Being aggrieved by the same, assessee filed an appeal before the tribunal, tribunal by its order dated 8.11.2006 allowed the appeal of the assessee and being aggrieved by the same revenue has come up in this appeal.

3. We have heard the counsel for the parties.

4 Counsel for the revenue contends that when the assesses had availed 50% of the Cenvat Credit for the relevant assessment year and having claimed depreciation u/s 32 of the Income Tax Act for the remaining un-utilized credit, it was not open for the assessee to claim credit again in subsequent assessment year. Therefore, he contends that issuance of show cause notice by the revenue and levy of interest and penalty was justified. According to him, tribunal without considering the relevant provision of law and without giving any finding has allowed the appeal. According to him, order passed by the tribunal is one without application of mind and contrary to Rule 4 of Cenvat Credit Rules. In the circumstances, he requests the court to allow the appeal.

5. Per contra, counsel for the assessee contends that in the first year assessee has utilized 50% of Cenvat Credit and the remaining 50% has been made use of for the subsequent financial year as it was in its credit. Counsel for the assessee contends that in view of Sub-rule (4) of Rule 4, assessee was entitled to claim depreciation u/s 32 of the Income Tax Act in respect of unused Cenvat credit. According to her, conduct of the respondent-assessee cannot be termed as violation of Rule 4 of Cenvat Credit Rules. She alternatively contends that the proceedings initiated by the respondent was also not maintainable since the assessee had reversed the credit in view of availment of depreciation u/s 32 of the Income Tax Act much prior to the issuance of show cause notice. In the circumstances, she requests the court to dismiss the appeal.

6. Having heard the counsel for the parties, we have to consider when the assessee has availed Cenvat credit to an extent of 50% in a particular financial

year and claim depreciation u/s 32 of the Income Tax Act and availed Cenvat credit in respect of unused 50% in subsequent assessment year. According to us, tribunal has committed a serious error in not considering Sub-rule (4) of Rule 4 of Cenvat Credit Rules. Without applying its mind, without coming to the conclusion how the assessee would be entitled to avail benefit of depreciation u/s 32 of the Income Tax Act and also claiming benefit of Cenvat credit in the subsequent year has allowed the appeal wrongly. Therefore, we are of the opinion that on account of improper interpretation of Sub-rule (4) of Rule 4 of Cenvat Credit Rules, relief has been granted to the assessee by the tribunal which according to us requires to be set aside. In the circumstances, we are of the view that the assessee cannot claim depreciation u/s 32 of the Income tax Act in respect of non-utilized Cenvat credit and claiming benefit for the relevant assessment year having claimed depreciation under the Income Tax Act. Accordingly, we answer the question of law in favour of the revenue and against the assessee. Counsel for the respondent contends that penalty and interest levied by the respondent has to be (sic) set aside by this Court since respondent much prior to the receipt of show cause notice has reversed the entries. So far as this point is concerned, appellant has not raised any question of law. On facts, if the entry has been reversed, we are of the view that the revenue cannot levy penalty or interest.

7. With the above observations, this appeal is allowed, answering the substantial question of law raised in this appeal in favour of the revenue and against the assessee.