

(2013) 02 BOM CK 0220

In the Bombay High Court

Case No : Excise Appeal No. 2 of 2006

The Commissioner of Central Excise

APPELLANT

Vs

M/s. Rudra Industries and M/s. Automobile Corporation of
Goa Ltd.

RESPONDENT

Date of Decision : 18-02-2013

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35(G), 35G

Citation : (2013) 7 BomCR 393 : (2013) 297 ELT 340 : (2013) 23 GSTR 305

Hon'ble Judges : V.M. Kanade, J;U.V. Bakre, J

Bench : Division Bench

Advocate : Susan Linhares, for the Appellant; M.S. Sonak, for the Respondent

Judgement

V.M. Kanade, J.—The Revenue/appellant is challenging the judgment and order passed by the CESTAT dated 2nd June, 2005, by which it was pleased to confirm the order passed by the Commissioner (Appeals) dated 26th April, 2000, who, in turn, had set aside the order passed by the Deputy Commissioner (Modvat) dated 20th December, 1999. The brief facts are as under:

Respondent No. 1 manufactured parts and accessories of motor vehicles and they had been availing Modvat/Cenvat facilities under Rule 57Q of the Central Excise Rules, 1944. Respondent No. 1 had filed a declaration for availing Modvat credit of duty paid on capital goods as required under Rule 57-T(1), declaring that the said goods shall not be used for manufacture of excisable goods which is either exempted from payable of duty by notification or chargeable to nil rate of duty. It is the case of the appellant that respondent No. 1 availed credit of duty paid on the capital goods in the month of July, 1997. However, the records maintained by respondent No. 1 indicated that they were not receiving raw material for production of any dutiable excisable goods, but were being used exclusively for processing of input/semi process goods on job work basis under Rule 57F(4) of the said Rules which are exempted under notification No. 214/86 dated 25th March, 1986. A show cause notice was issued on 14th November,

1997 to respondent no. 1 to show cause why the inadmissible credit should not be disallowed by the Superintendent, Central Excise, Bicholim. Reply was filed and after the parties were heard, the Assistant Commissioner, by order dated 14th December, 1998, disallowed the Modvat credit, amounting to Rs. 28,03,670/-. On 29th June, 1999, the appeal filed by respondent No. 1 was allowed by the Commissioner (Appeals) by remanding the matter to the Assistant Commissioner by giving a specific direction to consider whether respondent No. 1 had followed all the prescribed procedure in toto as laid down under sub-rules 4 to 7, of Rule 57T and after giving certain further directions, the matter was remanded to the Assistant Commissioner. The Assistant Commissioner, by his order dated 20th December, 1999, again held that the credit was inadmissible. Against the said order, respondent No. 1 filed an appeal which was allowed by the Commissioner (Appeals) by his order dated 26th April, 2000. An appeal was filed by the appellant herein before the CESTAT which was dismissed by order dated 2nd June, 2005.

2. Being aggrieved by the order dated 2nd June, 2005 passed by the CESTAT, the appellant preferred this appeal u/s 35(G) of the Central Excise Act, 1944.

3. The appeal was admitted by this Court by its order dated 20th March, 2007, on the following substantial questions of law:

a) Whether the Appellate Tribunal wrongly concluded that Notification number 214/86-CE dated 25.03.86 and Notification No. 217/86-CE dated 02.4.1986 were in pari - materia.

b) Whether the interpretation of Rule 57Q read with 57T(1) and 57T(2) of the Central Excise Rules, 1944, without considering Rule 57R(1) of the said Rules has resulted in miscarriage of justice.

4. We have heard learned Counsel appearing on behalf of the appellant and learned Counsel appearing on behalf of the respondent.

5. Learned Counsel appearing on behalf of the appellant has invited our attention to the impugned orders passed by the CESTAT, the Commissioner (Appeals) and also the order passed by the Assistant Commissioner. It was submitted that both the lower authorities had erred in relying on the Judgment in the case of Bajaj Tempo Ltd.. vs. Collector of Central Excise, Pune, reported in 1994 (69) E.L.T. 122 (Tribunal). It was submitted that in the case of Bajaj Tempo Ltd., (supra) the inputs utilized in manufacture of components and the final product was produced in another factory. In the said case, both the units belonged to Bajaj Tempo Ltd. However, in the present case, it was submitted that respondent No. 1 did not merge with respondent No. 2. Our attention was drawn to the finding recorded by the Assistant Commissioner who, after going through the agreement, had held that the agreement stated that the Modvat account lying in the excise account of Rudra Industries shall be responsible for all its liabilities on its own after 31.7.97 and no liability shall fall on ACGL on account of agreement dated 8.10.1997. It was further submitted that both the authorities had erred in relying

on the said judgment. Secondly, it was submitted that the factual aspects were not considered by the lower authorities and, therefore, it was contended that the matter should be remanded to the CESTAT with direction to consider the factual aspects. Reliance was placed on the judgment of the Apex Court in the case of Commissioner of Central Excise, Indore Vs. Cethar Vessels Ltd. and Others, . It was submitted that both the authorities had erred in relying on sub-rules 4 to 7 of Rule 57T, since the said rules were applicable with effect from 1st March, 1997 and the goods which are covered by the show cause notice were received prior to 1st March, 1997 and, therefore, the requirement of Rule 57T(2) would apply and not Rule 57T(4) which came into effect from 1st March, 1997. It was contended that the provisions of sub-rules 4 to 7 of Rule 57T came into force after the receipt of capital goods in the factory. It was contended that the respondent no. 1 had followed the provisions of earlier Rule 57T(1) and 57T(3) and had not followed the correct procedure and law in toto and the said goods were not accounted for in RG 23C Part I on the date of receipt, but were accounted for in RG 23C Part I only on 3.5.97 and therefore, the respondent No. 1 had not maintained the proper account of receipt and issue of the capital goods for installation/for use in the manufacture of final products till 3.5.97. It was further contended that respondent No. 1 had not manufactured dutiable excisable goods from the date of receipt of installation till 1.8.97 on which date the assessee asked for cancellation of the licence.

6. On the other hand, Mr. Sonak, learned Counsel appearing on behalf of the respondents submitted that the appeal u/s 35G could be entertained only on the substantial questions of law which were framed by the Court while admitting the appeal. It was submitted that the submissions which were made by the learned Counsel for the appellant in this Court were not pertaining to the substantial questions which were framed by the Court while admitting the appeal. It was secondly contended that the Commissioner (Appeals) had recorded findings of fact on various issues which were confirmed by the CESTAT and, as such, it was not open for the appellant to urge this Court to set aside the concurrent findings of facts. It was submitted that the judgment of the Apex Court in the case of Commissioner of Central Excise, Indore (supra) upon which reliance was placed, was entirely under different set of facts and, therefore, the ratio of the said judgment was not applicable to the facts of the present case. He, therefore, urged that the appeal is liable to be dismissed.

7. We have heard both the Counsel at length. In our view, the submissions made by the learned Counsel appearing on behalf of the appellant cannot be accepted. The appeal was admitted on two substantial questions of law which were framed at the time of admission of the appeal. Much emphasis, however, were not laid on the said two substantial questions of law which were framed by this Court. On the other hand, what was sought to be argued was firstly that the CESTAT, as also the Assistant Commissioner, erred in relying on the judgment in the case of Bajaj Tempo Ltd., (supra). It was urged that in the said case, both the units belonged to Bajaj Tempo Ltd., whereas in the present case, there was material

on record to show that respondent No. 1 did not merge with respondent No. 2. Reliance was sought to be placed on the order passed by the Assistant Commissioner, after remand, dated 26th April, 2000 wherein he had held that from the agreement of merger, it would be seen that it was agreed between the parties that the Modvat account lying in the excise account of Rudra Industries shall be responsible for all its liabilities on its own after 31st July, 1997 and no liability shall fall on ACGI on account of agreement dated 8th October, 1997. It was, therefore, submitted that in view of the said finding, the ratio of the judgment of Bajaj Tempo Ltd., (supra) was not applicable to the facts of the present case. Secondly, it was submitted that factual aspects were not considered by the lower authorities and, therefore, it was contended that the matter should be remanded to CESTAT with a direction to consider the factual aspects. Reliance was placed on the judgment of the Apex Court in the case of Commissioner of Central Excise, Indore vs. Cethar Vessels Limited and others (supra). It was further submitted that the authorities had erred in relying on sub-rules 4 to 7 of Rule 57T, since the said rules were applicable with effect from 1st March, 1997 and the goods which are covered by the show cause notice were received prior to 1st March, 1997 and, therefore, the requirement of Rule 57T(2) would apply and not Rule 57T(4).

8. The said submissions are without any substance, since, firstly, when the matter was remanded back to the Assistant Commissioner by order dated 29th June, 1999, the finding of fact which was recorded in the appeal, was not admittedly, challenged by the Revenue. Secondly, no specific direction was given by the Commissioner (Appeals) to reconsider the factual position while remanding the matter. The Assistant Commissioner misconstrued the said direction and even set aside the finding of fact recorded by the Commissioner (Appeals) in its order dated 29th June, 1999. Apart from that, after the Assistant Commissioner confirmed his earlier order, by order dated 20th December, 1999, the Commissioner (Appeals) and the CESTAT had recorded a finding which was contrary to the finding recorded by the Assistant Commissioner and, as such, the said finding of fact could not have been challenged by the Revenue in the present appeal. The Commissioner (Appeals) has recorded the following finding of fact in his order dated 26th April, 2000. Paras 7 and 8 thereof read as under:

7. I have carefully gone through the facts of the case, findings given in the impugned order and the law on the subject. I find that the ratio laid down by the decision of the Tribunal in the case of 1994 (50) ECR 549 is squarely applicable to the present situation of the appellant. Since Notification No. 214/85-CE is a notification with an objective similar to that of notification No. 217/86-CE and rule 57C considered by the Tribunal in the aforesaid decision is in pari materia with rule 57R involved in the present case.

8. I find that decision of the Tribunal in the case of Bajaj Tempo Ltd., case was followed in the case of 1997 (73) ECR 50 wherein it was held that the purpose of the Notification No. 217/86 is to avoid scriptory work when the wholly exempted

intermediate products are used in the manufacture of dutiable final products and hence rule 57C is not applicable in respect of the inputs used in the manufacture of the products cleared under the aforesaid notification. In any event of the matter, since the appellants unit has been taken over by ACGL, who are manufacturing dutiable final products, the MODVAT credit on the capital goods in question is legally available to them, in terms of Rule 57S(5) of the Central Excise Rules 1944.

9. The Commissioner (Appeals) had, therefore, clearly held that the appellant's unit had been taken over by the ACGL which are manufacturing dutiable final products and the MODVAT credit on the capital goods in question was legally available to them in terms of Rule 57S(5) of the Central Excise Rules, 1944. This finding of fact was confirmed by the CESTAT. The CESTAT in its judgment and order dated 2nd June 2005 has clearly observed in paragraph 3 as under:

3. After hearing both sides, and considering the material, it is found:

(a) the plea of Revenue to deny capital goods credit to goods exempted under Notification No. 214/86 when such capital goods are exclusively used for such purposes would not be in consonance with the decision in the case of Bajaj Tempo Ltd. wherein Notification No. 217/86 and No. 214/86 was the subject matter for consideration before the Tribunal. Notification No. 214/86 and No. 217/86 were enabling notifications issued to avoid clerical work of payment & of duty and taking of credit, when goods were being consumed within the premises or sent out to another premises on job work. The notifications having been issued to supplement and enable the implementation of the provisions of the Modvat procedure rules cannot be a cause to deny Modvat credit. We find no infirmity in the Commissioner (Appeals) order in having found the mutuality in the two notifications and *pari materia* Rule 57C and Rule 57R.

10. From the above finding, it can be seen that the contention of the Revenue that the judgment in the case of Bajaj Tempo Ltd. (*supra*) was not applicable, was considered and rejected by both the authorities. The contention of the Revenue that the credit of capital goods was inadmissible and no benefit could be given to M/s. ACGL under Rule 57S(5) was in terms rejected by both the authorities. The substantial questions of law as framed by the Court were not pressed. It can, thus, be seen that in the present case, the Commissioner (Appeals) and the CESTAT have both recorded a finding of fact that the appellant's unit had been taken over by the ACGL and the manufacturing dutiable final products, and consequently, Modvat credit on the capital goods in question is legally available to them. The finding of the Assistant Commissioner that the said two units were separate, which finding was arrived at after interpreting the agreement between the parties, was not accepted and the said finding was in terms set aside. The appellant, therefore, had no right to challenge the concurrent finding of facts in this appeal.

11. In so far as the reliance which is placed on the judgment of the Apex Court in

the case of Commissioner of Central Excise, Indore Vs. Cethar Vessels Ltd. and Others, is concerned, a perusal of the said judgment would clearly indicate that the issue involved in the said report was entirely different and as such, the ratio of the said judgment would not apply to the facts of the present case. Hence, no case is made out for interference with the judgments and orders passed by both the Authorities. The appeal, therefore, is dismissed.