

(1993) 05 AHC CK 0064

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No. 1580 of 1991

Varuna Sulphonators Pvt. Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 04-05-1993

Acts Referred:

Central Excise Rules, 1944 — Rule 57I
Constitution of India, 1950 — Article 226

Citation : (1993) 68 ELT 42

Hon'ble Judges : S.P. Srivastava, J;Om Prakash, J

Bench : Division Bench

Advocate : A.P. Mathur, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

1. The petitioner is engaged in the manufacture of acid slurry. It is not disputed that for the manufacture of acid slurry, sulphuric acid is used as "input". During the process of manufacture of the acid slurry, contends the petitioner, a by-product is obtained known as "spent sulphuric acid". On duty-paid input from May to October, 1991, the MODVAT Credit was taken in full by the petitioner while clearing the final product, that is, the acid slurry.

2. Taking recourse to Rule 57-I of the Central Excise Rules, 1944 (briefly "the Rules"), impugned notice dated 28-11-1991 (Annexure "6" to the writ petition) was served on the petitioner calling upon it to show cause why MODVAT credit to the extent of Rs. 36,798/- should not be recovered from it. Brief reason for demanding the aforesaid amount given in the said notice, is that duty-paid input was not consumed in full in the manufacture of final product and that "the differential quantity is neither waste nor a product other than the said input except that it gets diluted and known as "SPENT ACID"." The stand taken in the impugned notice is that the entire duty-paid input during the relevant period was not actually consumed in the final product and, therefore, the petitioner was not entitled to take MODVAT credit in respect of the spent acid, that is, the input

which according to the respondents was not actually consumed in the final product. The notice further states that "The percentage of consumption of the said input as compared to the quantity issued on an average works out to 41.76% and that remaining 58.24% spent acid remained unconsumed, on which MODVAT credit was erroneously allowed to the petitioner. It is this mistake which is sought to be rectified by respondents under Rule 57-I of the Rules.

3. It is not disputed that the entire duty-paid input relevant for the purpose of this case was subjected to and applied in the manufacturing process. It is also not denied by the petitioner that during the manufacturing process of detergent, which the petitioner is manufacturing, when water is added to the mass, sulphuric acid layer is separated from the acid slurry and that results in what is called as the spent sulphuric acid or the spent acid.

4. The question for consideration is whether on account of formation of spent acid during the manufacturing process, can it be said that the entire duty paid input was not used in the manufacture of final product? This is purely a legal question and, therefore, we heard the parties, though respondents simply served a show cause notice, which ordinarily is not interfered with under Article 226 of the Constitution, as against the show cause notice a petitioner has ample opportunity to have his say before the concerned Authority.

5. The MODVAT Scheme provides for instant credit of the excise duty paid on inputs when used in or in relation to the manufacture of final product. No doubt the duty paid input, which is not used in the manufacturing process, would not be eligible for the MODVAT credit. To take MODVAT credit, the final product should be dutiable. Where the final product is exempt from excise duty, no credit of the duty-paid on the inputs would be available. Let us proceed to find out whether on the facts and the circumstances of the case, it can be said that the entire relevant duty paid input was used in the manufacture of the final product. The MODVAT Scheme does not emphasise that during the manufacturing process, the entire duty-paid input must be actually consumed, but the emphasis is on the use of the duty-paid input in the manufacture of final product. The words "used" and "consumed" are not identical and synonymous. They have not been defined in the Rules and in the Central Excises and Salt Act, 1944. The verb "use" as per Chambers English Dictionary means: "to put to some purpose; to avail oneself of; to resort to; to make use of; to take or consume...". The verb "consume" in the same dictionary means: "to destroy by wasting, fire, evaporation; to use up; to devour; to waste or spend; to exhaust...". The word "used" does not indicate that a thing, which is liquid, can be said to be used only when it is spent up to the last drop. The word "consumed" may be used in the sense that a thing which is consumed must be finished, exhausted or devoured in full, but that is not the sense in which the word "used" is used. To qualify for MODVAT credit, what is required is that a given input should be used in the manufacture of final product. There is nothing to show that MODVAT credit will not be allowed, if a manufacturer is not able to prove that required input has

been exhausted so as to not leave even a drop of it behind. When the entire quantity of sulphuric acid was subjected to the manufacturing process, it cannot be said that the same was not used for the manufacture of final product, simply because due to water being added, a layer is created which separates the spent acid from the final product. Once the duty paid input is physically involved in the manufacturing process, that can be said to have been used despite the fact that the same is not fully assimilated in the final product. Hundred per cent absorption or assimilation of the duty paid input in the final product is not a sine qua non of MODVAT credit, but to take benefit of MODVAT Scheme, the petitioner is required simply to establish that the input was used in the manufacture of final product. The sulphuric acid (duty paid input) can be said to have been used by the petitioner in the manufacture of final product when the entire relevant quantity thereof was applied or subjected to the manufacturing process.

6. In *Swadeshi Polytex Ltd. Vs. Collector of Central Excise*, the question for consideration before the Supreme Court was whether ethylene glycol, which was used in the manufacture of polyester fibre and which during the manufacturing process gave rise to methanol, was eligible to proforma credit, which scheme is *pari materia* to MODVAT. The proforma credit scheme applies to only when both the inputs and final product fall under the same tariff heading or when the remission or adjustment of the duty paid on the inputs is sanctioned by the Government through a notification. On the other hand, the MODVAT Scheme does not require any notification in individual cases. In short, whereas the former is somewhat complicated, the latter is very simplified and convenient, but the common feature of both is that credit can be taken only when duty-paid input is used in the manufacture of final product. In *Swadeshi Polytex Ltd.* (*supra*) the Notification No. 201/79, dated 4-6-1979 exempted all excisable goods on which duty of excise was leviable and in the manufacture of which any goods falling under Tariff Item 68 had been used, from so much of the duty of excise as was equivalent to the duty of excise paid on the inputs. The appellants claimed set-off of duty on ethylene glycol used in the manufacture of polyester fibre under the notification dated 23-6-1979. That benefit was denied by Excise Authority under the proforma credit scheme mainly on the ground that methanol formed during the manufacturing process, possessed ethylene glycol contents. The question was whether the appellants became ineligible to claim set-off of duty on ethylene glycol used in the manufacture of polyester fibre to the extent it gave rise to methanol. In the premises, the Supreme Court held that even though a part of the ethylene glycol was contained in the methanol, yet the credit of duty could not be reduced to the extent of the ethylene glycol contained in the methanol as ineligible. The Supreme Court held that ethylene glycol was used in the manufacture of polyester fibre, though methanol had arisen as a part and parcel of the chemical reaction during the process of manufacture, when ethylene glycol interacted with DMT to produce polyester fibre. Giving the reasoning, the Supreme Court says that it is not possible to use a lesser quantum of the ethylene glycol to prevent methanol for producing a certain quantity of polyester

fibre and that the appellant was engaged in the production of polyester fibre and not methanol.

7. Applying the ratio of M/s. Swadeshi Polytex Ltd. (supra) to the case of the petitioner, we hold that the petitioner is not charged for having used extra duty paid input and that the petitioner is not engaged in the manufacture of spent acid; the latter simply emerges in the manufacturing process.

8. From the record of the case, it appears that the Excise Authorities also consistently held that when sulphuric acid was put to manufacturing process, MODVAT credit could not be denied to a manufacturer of detergent, simply because the entire input was not merged in the final product and that the spent acid emerged in the manufacturing process.

9. The contention raised in the show cause notice that spent acid is nothing "other than duty paid input" has to be rejected.

10. The Board issued a Circular dated 26-9-1988 (Annexure "2" to the writ petition) after considering the opinion of the Chief Chemist that MODVAT credit is admissible on concentrated sulphuric acid when used in the manufacture and spent sulphuric acid is not a manufactured product. The Board, therefore, decided that spent acid is not a manufactured product and, therefore, the MODVAT credit should be restricted to the duty element on the concentrated sulphuric actually consumed in sulphonation reaction. As a result of this Circular, the impugned notice seems to have been issued to the petitioner.

11. Our attention has been drawn to another circular dated 18-5-1992 (Annexure "1" to the rejoinder affidavit). The genesis of this circular is that several manufacturers of detergent represented against the existing instructions of the Board with regard to admissibility of MODVAT Credit on sulphuric acid used in the manufacture of detergent. MODVAT Credit as per the Circular dated 26-9-1988 was allowed only on the quantity of concentrated sulphuric acid actually consumed in the manufacture of final product. Collectors of Central Excise also felt that the existing instructions require reconsideration, inasmuch as, sulphuric acid (duty paid input) is used as one of the raw materials and the entire quantity of concentrated sulphuric acid used is physically involved in the manufacturing process, although some portion remains and is separated by adding water, which results in spent acid. Emphasis of the manufacturers and the Collectors was that the entire quantity of concentrated sulphuric acid is actually used in the manufacture of acid slurry/detergent powder. The Board, therefore, re-examined the whole issue and then issued a fresh circular dated 18-5-1992, ordering that MODVAT credit can be taken on the full quantity of Sulphuric acid used in the manufacture of detergents. In this circular, the Board does not say that credit will be allowed only on that input which is actually consumed. The effect of the circular dated 18-5-1992 is that it rescinded all existing instructions and permitted credit on the entire input which is put to use in the manufacture. This circular fully supports the contention of the petitioner.

12. In the light of the aforesaid observations, MODVAT credit already allowed on the duty paid input during the period from May 1991 to October, 1991, cannot be recovered under Rule 57-I of the Rules, inasmuch as there was no error in allowing the same.

13. The circular dated 18-5-1992 also says that like concentrated acid, spent acid can be cleared only after payment of excise duty.

14. The Standing Counsel, therefore, urged that spent acid is a saleable commodity and under the said circular that can be cleared only on payment of duty, unless otherwise exempted from payment of duty. We refrain from going into this question, inasmuch as, it involves facts which cannot be decided under Article 226 and as it does not arise from the impugned notice.

15. Whether spent acid is a by-product; whether by-product contains only spent acid and whether that contains all the materials used in the manufacturing; if so, what is the ratio of the sulphuric acid therein; whether the spent acid is sold in the market and whether that fetches the same price which concentrated sulphuric acid does; whether by-product is exempt or chargeable to duty, if so, its effect; whether spent acid could be cleared with or without duty; whether spent acid and concentrated sulphuric acid are at par and whether the former is eligible at the same rate of duty which is applicable to the latter; whether spent acid like concentrated sulphuric acid, could be cleared only on payment of duty - all these questions are left open for consideration of the respondents and we refrain from giving any finding on these questions, as we have not touched upon them during the hearing. The respondents may pass an appropriate order levying excise duty on spent acid, if the same cleared illegally without payment of duty.

16. We restricted ourselves to the hearing of only one question raised in the impugned notice whether or not the sulphuric acid applied to the manufacturing process, could be said to have been used in the manufacturing and if so, whether the respondents rightly sought to recover MODVAT credit, already allowed to the petitioner on such input.

17. Subject to the aforesaid observations, the petition is allowed and the impugned notice dated 28-11-1991 (Annexure "6" to the writ petition) is quashed.