

Collector of Central Excise Vs. Arihant Packaging

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-07-1997

Reported in : (1997)(96)ELT98TriDel

Appellant : Collector of Central Excise

Respondent : Arihant Packaging

Judgement :

1. The revenue filed this reference application for referring the following points of law which were claimed to be arisen out of decision in Order No. A/1012/96-NB, dated 22-3-1996 passed by the Tribunal: (i) Whether the Hon'ble Tribunal is correct in altering the expression in Rule 57C from whole of duty of excise... to "final product avails of exemption from whole of duty of excise leviable thereon" in order to allow the party to avail option.

(ii) Whether in construing Rule 57C, the only question to be asked and answered is whether the final product is exempt from the whole of duty of excise or it is chargeable to nil rate of duty or any other condition is required to be considered.

(iii) Whether embargo laid down by Rule 57C is absolute and categorical.

(iv) Whether the provisions of explanatory notes appended to the Finance Bill 1994 will apply to the unregistered units also.

(v) Whether in the facts and circumstances of the case and in view of decision of A.P. High Court in the case of Ganesh Metal Processing Industry and Ors v. U.O.I

- 1996 (81) E.L.T. 11 (A.P.) the CEGAT Final Order No. A/1012/96-NB, dated 29-3-1996 is legally correct and proper order or not.

2. Shri Y.R. Kilaniya, Id. JDR appearing on behalf of the applicant submitted that in the Order No. A/1012/96-NB, dated 22-3-1996, the Tribunal held that the option was that of assessee either to opt for availing the benefit of exemption or to opt for the benefit of credit of duty under Modvat scheme. He submitted that this view is contrary to the decision of the Hon'ble High Court of Andhra Pradesh in case of Ganesh Metal Processing Industries v. Union of India reported in 1996 (81) E.L.T. 11 (A.P.). The Hon'ble High Court held that: "19. While on this aspect I would like to steer clear of a misconception implicit in the arguments on both sides. The assumption that there is an option left to the assessee either to avail of the credit on inputs under Modvat scheme or to avail of the exemption from duty under Notification No. 202 of 1988 and the petitioners have, therefore, exercised the former option is, in my considered view, not correct. This option theory has no legal basis.

I am driven to come to this conclusion by reason of Rule 57C of the Central Excise Rules. Rule 57C categorically lays down that "no credit of the specified duty paid on the inputs used in the manufacture of a final product shall be allowed if the final product is exempt from the whole of the duty of excise leviable thereon or is chargeable to nil rate of duty". The only exception is in the case of the goods cleared to a Unit in a free trade zone or to a 100% export oriented Unit. Here, we are not concerned with this exception. Rule 57C clearly and advisedly enacts an embargo against the credit of duty paid on the inputs being allowed if the resultant final product is exempt from the whole of the duty of excise leviable thereon. The *raison d'être* of this Rule is not difficult to seek. Credit is available under Chapter AA (which is the newly introduced Chapter to give effect to Modvat scheme) only towards the payment of duty leviable on the final products. If the final products themselves are exempt from the duty or chargeable to nil rate, the question of payment of duty and the allowance of credit in this behalf does not arise. The opening Rule 57A emphasises this concept in unmistakable terms by employing the words "for using the credit so allowed towards payment of duty of excise leviable on the final products." Thus, the scheme embodied in Chapter AA of the

Rules is not to allow Modvat credit, if final product is exempt. The operation of this rule does not depend upon the volition of the assessee.

19(a). Rule 57C itself cannot be so construed as to provide for an option, by necessary implication or otherwise, to claim exemption or to avail of the Modvat credit. In construing Rule 57C, the only question to be asked and answered is whether the final product is exempt from the whole of the duty of excise or it is chargeable to NIL rate of duty. Whether or not the final product is wholly exempt or chargeable to NIL rate of duty depends upon the terms of the statutory notification or any other provision made under the Central Excise Act and the Rules. When once such a notification or provision is found, there is no scope to take credit of the duty paid on the inputs under Rule 57A and other allied provisions. The embargo laid down by Rule 57C is absolute and categorical. In the face of this clear-cut embargo, it is futile to content that the assessees have still an option to utilise the credit on the inputs under Rule 57A read with Rule 57G. No statutory order or Notification has been placed before me which, despite the prohibition contained in Rule 57C, enables the assessee to seek shelter under Modvat scheme. Thus, I am of the view that the Modvat credit was erroneously allowed to the petitioners even after the Notification 202/88 granting exemption from the whole excise duty payable was an issued by the Central Government. Obviously, this was done under a mutual mistake and the course of action adopted by the petitioners and assented to by the Department has no sanction of law." 3. He submitted that in view of the decision of the Hon'ble High Court, the question of law arising out of the order of the Hon'ble Tribunal be referred to the Hon'ble Delhi High Court for their valuable opinion.

4. Shri J.S. Agarwal, advocate appearing on behalf of M/s. Arihant Packaging submitted that the Tribunal in the Order No. A/1012/96, dated 22-3-1996 relying upon the earlier decision of the Tribunal in the case of Everest Convertors reported in 1995 (80) E.L.T. 91. The Tribunal further followed this decision in the case of Gothi Plastic Industries and Ors v. Collector of Central Excise reported in 1996 (83) E.L.T. 123 (Tribunal). He submitted that the Revenue has accepted these decisions.

Therefore this reference application is liable to be dismissed on this ground.

5. Heard both sides. The question that arise for consideration in this matter is whether any question of law arise out of order of the Tribunal meriting a reference to the Hon'ble High Court.

6. The facts of the case which were decided by the Tribunal vide Order No. A-1012/96-NB, dated 22-3-1996 are that M/s. Arihant Packaging in respect of claiming exemption on their final product under Notification No. 1/93, dated 28-2-1993 during the period 1-4-1993 to 31-8-1993 paid duty on the final product and claimed Modvat credit on the inputs. The revenue issued a show cause notice that M/s. Arihant Packaging were not entitled to avail the Modvat benefit as the final product under the exemption Notification No. 1/93, dated 28-2-1993. The Tribunal after following the decision of Everest Convenors and in the case of Gothi Plastic Industries (supra) held that the option was of assessee to either opt for availing the benefit of exemption or to opt for credit of duty under Modvat Scheme. The applicant relied upon the decision of the Hon'ble High Court of Andhra Pradesh in the case of Ganesh Metal Processing v. Union of India reported in 1996 (81) E.L.T. 11 (A.P.).

The applicants relied upon the observations made in Para 19 where the Hon'ble Justice P. Venkatarama Reddy while agreeing with the conclusion he has taken a different route to reach the same conclusion. In para 9 of the judgment the Hon'ble High Court held that "we are of the view that sole purpose of granting exemption from payment of duty on benefit of Modvat scheme is to give incentive and some financial help to the Small Scale Industries and this very purpose will be frustrated if a person opting for exemption and those opting not for exemption were treated differently even though the benefit for the two claims of exemption and Modvat credit is one and the same. Accordingly unless or until it could be shown that those deriving benefit under the Modvat scheme enjoy more advantageous position then get total exemption notification. The benefit arising out of subsequent notification could not be denied to the persons who had opted for benefit of Modvat scheme."

7. From the above observations of the Hon'ble High Court, it is clear that between Modvat scheme and the exemption to the Small Scale Industries, it is for the

assessee to choose which is best suited to him. In the case of Ganesh Metal Processing Industries, (supra) the Hon'ble High Court allowed, the writ petition filed by the assessee who were operating under the Modvat credit is one and the same. Accordingly unless until it could be shown that those driving benefit under the Modvat scheme and who wants to avail the exemption under Notification No. 1/93. In view of the ratio of the decision of the Hon'ble High Court in Ganesh Metal Processing Industries Ltd., I do not find merit in the question of law mentioned at No. 1, 2, 3 and 5 in the application filed by the Revenue.

8. In respect of question No. 4, whether provisions of explanatory notes having appended to Finance bill will apply to unregistered units also, I find that this point was never raised before the Tribunal at the time of hearing of the appeal. Therefore applicants are not entitled to take up this point in the reference application for the first time. In view of the above discussion, I do not find any merit in the reference application. The reference application is dismissed.

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