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Laxmi Enterprises Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jul-22-1997

Reported in : (1997)(96)ELT428TriDel

Appellant : Laxmi Enterprises

Respondent : Collector of Central Excise

Judgement :

1. Since the issue for determination before us in these three appeals is the same, they were heard together and are being disposed of by this common order.

2. The facts of the three appeals are that the appellants were eligible for the exemption up to Rs. 30 lakh on the first clearance in terms of Notification No. 1 /93. The appellants instead of availing the facility of exemption up to Rs. 30 lakh started paying duty and availed credit of duty paid on the inputs under the Modvat scheme. The department alleged that the benefit of Modvat scheme could not be availed of by the appellants in view of the Rule 57C. Accordingly the appellants were asked to explain as to why the amount of credit of duty taken by the appellants should not be disallowed to them and why the amount equivalent to the credit already utilised should not be recovered from them under Rule 57-I. The appellants submitted that Rule 57C restricts the taking of credit only when the final product was exempt. The appellants also argued that the exemption under Notification No. 1/93 was to the manufacturer as an SSI unit up to the value of Rs. 30 lakh; that this notification did not exempt the goods and was not applicable to all the manufacturers. Thus the notification was conditional and since the

notification was conditional, the option was with the assessee either to avail of the exemption accorded under Notification No. 1 /93 or pay duty on the final product and take credit of duty paid on the inputs. It was also submitted by the appellants that there are a number of decisions of this Tribunal which clearly held that the option is of the assessee either to avail the exemption under Notification No.1 /93 or to pay duty on the final product and avail the benefit of credit of duty on the inputs under the Modvat scheme. The lower authorities after considering the submissions made by the appellants held that the Modvat credit taken by the assessee was not admissible to them and, therefore, it was disallowed and the amount availed for the payment of duty on the final product is recoverable from the appellants.

3. Shri Naveen Mullick, learned Advocate appeared for M/s. Pascal Paramount (P) Ltd. and M/s. Perfect Polymers and Shri M.P. Devnath, learned Advocate appeared for M/s. Laxmi Enterprises.

4. Arguing on the issue, the learned Counsels submit that the issue has now been settled finally by a number of decisions of this Tribunal; that this Tribunal has been consistently holding that the appellants have an option either to avail of the exemption under Notification No.1/93 or to pay duty on the final product and avail the benefit of credit of duty paid under the Modvat scheme. The learned Counsels submit that this view has been taken in the case of M/s. Everest Convenors - 1995 (80) E.L.T. 91 and that this view has further been followed by this Tribunal in their Final Order No. A/356/97-NB, dated 20-2-1997 in the case of J.B. Industries. The learned Counsels submit that the similar view was taken by the Tribunal in the case of Gothi Plastic Industries -1996 (83) E.L.T. 123 in the case of Modern Engg.

Works -1996 (15) RLT 39 and in the case of M/s. Mechiv Engineers in its Final Order No. A/31/97-NB, dated 6-1-1997. The learned Counsels submit that their cases are fully covered by the ratio of the above decisions and, therefore, pray that these three appeals may be allowed.

5. Shri Y.R. Kilaniya, learned JDR appearing for the respondent Commissioner reiterates the findings of the lower authorities.

6. Heard the submissions of both sides. We find that the main issue in these three appeals is whether there is an option with the assessee either to avail of the exemption under Notification No. 1/93 or to pay duty on the final product and take credit of duty on the inputs. We note that the appellants cited and relied upon the decision of this Tribunal in the case of M/s. Everest Conver-tors. The Tribunal, in Paras 5.4 to 5.10 of its order, had held as under : "5.4. It would thus be observed that the power under Section 5A(1) given to the Central Government is to issue a notification for exemption from duty leviable on such excisable goods. Power to exempt is without doubt a beneficial power. It can only reduce rates of duty. Notifications, no doubt has statutory force, drawing their authority from the provisions of a statute. Notification having character of exemption cannot be forced upon an assessee if it does not suit him. If this character of a notification under Section 5AA(1) is ignored, and it is forced upon an assessee, then the power under Section 5A would have been simply a power to fix rates of duty, not exceeding the rate prescribed in the Schedule to the Central Excise Tariff Act, 1985 and perhaps simultaneously, the provisions in the said enactment would have expressed clearly that the rates prescribed are the 'ceiling' or 'maximum' rates subject to reduction by Central Government. In this connection, difference in language in Section 3(2) of the Central Excises and Salt Act, 1944 and Section 5A(1) is apparent. Section 3(2) gives the peremptory power to the Central Government to fix values in respect of excisable goods and those values replace the value under Section 4.

It is neither the option of the assessee nor that of the Department to assess the goods on the basis of the 'normal price' under Section 4 of the Act, if tariff values have been fixed under Section 3(2) of the Act.

5.5. If an assessee claims the benefit of an exemption notification, he cannot be denied the same so long as he fulfils the terms of the notification. It is to be noted here that an assessee has to claim the concession. This is because he alone knows whether he fulfils the terms of the notification, and it is well settled [Mysore Metal Inds. v. C.C.E. - 1988 (36) E.L.T. 369 (S.C.)] that it is burden of an assessee to prove that he is within the four corners of the terms and conditions of the notification. In other words, if an assessee does not claim the benefit of a

notification, its benefit shall not be extended to him. Effect of not claiming the benefit of a notification under Section 5A(1) would be that the excisable goods would be assessable at the tariff rate. I am fortified in my views by the following observations of Hon'ble High Court of Calcutta in the case of I.T.C. v. Union of India [1988 (34) E.L.T. 473)]: '22. In cases of interpretation of a notification regarding exemption, the cardinal principle is just the opposite to that of principle of interpretation as is applicable to a taxing statute.

Here the petitioner is given certain benefits by way of exemption and that in my view, if a party intends to get the benefit of exemption notification, that party has to strictly follow the requirements of the notification and the benefit of doubt in cases of any ambiguity or doubt does not and cannot benefit the party in as much as, here is a case, I find that the petitioner was enjoying a concession on the basis of the notification in question, otherwise the petitioner was liable to pay duty on the basis of the ordinary rate which is admittedly higher than the concessional rate...' It is, therefore, the intention (or choice) of an assessee which is material for claiming the benefit of an exemption notification. If he does not implement his intention of claiming the benefit of an exemption notification, he has to pay the tariff of duty applicable to the goods.

5.6 Law Ministry's opinion set out above denying the option to an assessee to claim the benefit of an exemption notification rests on Supreme Court's following observation in the case of Kailash Nath v. State of Uttar Pradesh 'This notification having been made in accordance with the power conferred by the statute has statutory force and validity and, therefore, the exemption is as if it is contained in the present Act itself. The question for decision in this petition is whether the petitioners are entitled to avail themselves of this exemption, and whether, therefore, the levy was illegal'.

We are of the view that these observations were made in a totally different context. In that case, the Apex Court was examining the question whether a certain exemption notification issued by the authorities in the State of Uttar Pradesh under the Sales Tax Act of the State was applicable to certain goods of an assessee when he claimed the exemption. The Apex Court did not rule that the notification

will have to be applied even if it was not claimed by an assessee. Nature of the 'exempting' power was not under examination by the Court.

5.7 Nature of the power under Rule 8(1) of the Central Excise Rules has been subject matter of some cases, though on different aspects of that power. An exemption notification prescribed a rate of exemption (rebate) higher than the tariff rate of duty levied by the Schedule to the Act. Government of India held in the case of Terna Shetkar [1980 (6) E.L.T. 369 (G.O.I.)] that a notification under Rule 8(1) cannot give a rate of concession higher than the rate of duty leviable on the goods.

5.8 The question can be examined from another angle. Just as an exemption notification has statutory force as if it is contained in the Act, so do Modvat Rules contained in Chapter V Section AA of the Central Excise Rules, 1944 have statutory force as if these are part of the Central Excises and Salt Act, 1944. Under Rule 57A of Central Excise Rules, 1944 read with Notification 177/86-C.E. issued thereunder, an assessee is entitled to benefit of Modvat credit of duty paid on inputs for the purpose of utilising the credit towards payment of duty on the final product. Effect is that an assessee is entitled to or, acquires a right to, the benefit of full exemption notification as also to the benefit of Modvat credit of duty paid on inputs. These are mutually exclusive benefits as well inasmuch as, on the one hand, if his final produce is not liable to pay duty at all, benefit of Modvat credit of duty paid on inputs will not be available to him, and on the other, if he wants to pay duty on final product, benefit of Modvat credit of duty paid on inputs cannot be denied to him. It does not require an authority to say that if a person has a choice of one of the two benefits available to him, it is his option which benefit he would like to avail of.

5.9 In view of the aforesaid discussion we hold that it is the option of an assessee to claim or not to claim the benefit of an exemption notification issued under Section 5A(1). If the basic premise of C.B.E.C's Circular of 1991 falls, the conclusion based on that premise also falls. Consequently, an assessee cannot be denied the benefit of Modvat credit of duty paid in inputs used in the manufacture of the final product on which duty is paid, even though the final product is exempt

from duty. This position reverts to the circular of 1988 relied upon by the Appellants herein, which in our view, correctly reflects the legal position.

5.10 Learned JDR draws our attention to the wording of Rule 57C and submits that so long as the goods of an assessee are fully exempted, Modvat credit cannot be allowed. Relevant portion of Rule 57C is reproduced below: '57C. 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 whole of duty of excise leviable thereon....

' He submits that the wording of Rule 57C does not use the expression that 'no Modvat credit shall be allowed who avails of the full exemption of duty on final product.' We are afraid that there is a fallacy in this argument. Once we hold that availment of an exemption notification is an option with an assessee, the expression in Rule 57C '...final product is exempt from whole of duty of excise...' has to be read as '...final product avails of exemption from whole of duty of excise leviable thereon....', otherwise this will frustrate the basic purpose of the scheme of Modvat credit, i.e. to avoid cascading effect of duty upon duty." 7. These paragraphs of the judgment of this Tribunal bring out that there is an option with the assessee either to avail exemption or to avail the benefit of Modvat credit. We note that the department had relied upon the judgment of Andhra Pradesh High Court in the case of Ganesh Metal Processing Industries -1996 (81) E.L.T. 11 (A.P.). For the sake of clarity Para 19 and 19(a) of its judgment are reproduced as under :- "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. 202/88 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 duty of excise 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 of excise leviable thereon. The raison d'etre 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 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 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 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 contend that the assessee have still an option to utilise the credit on the inputs under Rule 57A read with Rule 57C. 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 credit was erroneously allowed to the petitioners even after the Notification No. 202/88 granting exemption from the whole of excise duty payable was 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." 8. We find the issue before the Hon'ble High Court was the Notification No. 202/88 vis-a-vis Rule 57C. We note

that the Notification No. 202/88 granted exemption to certain goods. This notification inter alia provided for the the exemption of specified goods described in the table annexed with the notification from the whole of duty of excise leviable thereon. In the instant case, the exemption is to the unit and not to the goods because the same goods manufactured by another unit which was not a SSI unit. An unregistered unit falling under different clauses of Notification No. 1/93 was not eligible for the exemption.

Thus the goods themselves were not exempted. Whereas in the case before the Hon'ble High Court, the goods themselves were exempted and, therefore, the fact in the two cases are distinguishable and, therefore the judgment of the Andhra Pradesh High Court does not help the department.

9. We note that this Tribunal has been consistently holding in such cases that there is an option with the assessee and that the option either to pay duty on the final product and avail the benefit of credit of duty paid on the inputs under the Modvat scheme squarely lies with the assessee.

10. Following the ratio of the above judgments of this Tribunal, we hold that the assessee had an option and, therefore, the benefit of Modvat credit claimed by the assessee is legally sustainable. In the circumstances, these three appeals are allowed with consequential relief in accordance with law.

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