

Telco Ltd. Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Oct-15-1997

Reported in : (1998)(97)ELT439Tri(Mum.)bai

Appellant : Telco Ltd.

Respondent : Commissioner of Central Excise

Judgement :

1. The present appeal is against the Order-in-Original No. 89/CEX/95, dated 30-11-1995 passed by the Commissioner of Central Excise, Pune.
2. The appellants are, inter alia, manufacturing, in their factory at Pune, the following products: (i) Cars falling under Heading 87.03 of the Central Excise Tariff (models Tata Sierra and Tata Estate) (ii) Light Commercial Vehicles (LCV) and Heavy Commercial Vehicles (HCV) falling under Heading 87.04 3. The appellants are operating under the Modvat scheme Under Rule 57A ever since 1986. Ever since then, they have been maintaining Modvat credit account in a consolidated manner in form RG 23A Part II. Credit in respect of duty paid on all inputs received in the factory are entered in this register. Excise duty liability on the final products is discharged by payment of duty by debit in the RG 23A Part II register. Duty is also discharged by debit in PLA whenever required.
4. The Central Excise Department found that the duty payable on cars (Tata Estate/Tata Sierra) is substantially higher than the Modvat credit available on inputs used in their manufacture. According to Para 7 of the show cause notice,

Modvat credit available on the inputs for motor cars worked out to around 15% of the assessable value of the motor cars while duty payable thereon is 40%.

5. The Central Excise Department also felt that the duty payable on LCV/HCV and chassis thereof is much less than the Modvat credit available on the inputs used in their manufacture. According to Para 8.2 of the show cause notice Modvat credit available on the inputs for LCV/HCV was around 12.65% of the assessable value of LCV/HCV while the rate of duty on fuel efficient LCV was 10% and HCV was 15%.

6. The Department alleged that only a small portion of the duty was being paid on Tata Estate/Tata Sierra by debit in PLA account and a substantial amount of duty was paid by debit in RG 23A Part II account.

According to the Department, this was not in accordance with the position that the Modvat credit available on the motor cars as a percentage of the assessable value of the cars was only around 15% while duty payable on the cars was 40% of the assessable value.

7. The Department charged that on account of maintenance of RG 23A Part II in a consolidated manner, the appellants were able to utilise the surplus Modvat credit attributable to inputs actually used in the manufacture of LCV/HCV and chassis thereof, for payment of duty on Tata Estate/Tata Sierra.

8. The Department took the view that when the inputs are not used in the manufacture of Tata Estate/Tata Sierra, Modvat credit thereon cannot be utilised for payment of duty on Tata Estate/Tata Sierra.

9. Therefore, the Department issued a show cause notice on 6-12-1994 for the month of May, 1994 alleging therein that the appellants have utilised inadmissible Modvat credit to the extent of Rs. 5,75,68,713.00 for payment of duty on Tata Estate/Tata Sierra. According to the show cause notice, this amount ought to have paid in cash by debit in PLA for clearance of Tata Estate/Tata Sierra for the month of May, 1994.

10. On the same basis, show cause notice dated 1-1-1995 was issued in respect of clearance of Tata Estate/Tata Sierra for the period June, 1994 to November, 1994 demanding duty of Rs. 33,02,91,553/-.

11. The show cause notices were contested by the appellants on diverse grounds.

12. After hearing the appellants, the Commissioner of Central Excise, Pune passed the impugned order confirming a duty demand of Rs. 3,19,52,572/- for the month of May, 1994 and Rs. 20,44,14,5327- for the months of June, 1994 to November, 1994. The Collector has also imposed a combined penalty of Rs. 1.00 lac Under Rule 173Q(1)(a) of the Rules.

14. In the impugned order the Commissioner has held that though Under Rule 57F(4) of the Central Excise Rules there is no 1 : 1 co-relation required between input and final product for Modvat credit purposes, the rule requires that the inputs should be used in or in relation to the manufacture of particular final product. Therefore, when the inputs were never used in the manufacture of passenger cars, Modvat credit thereon cannot be utilised for paying duty on the cars. The Collector also found support for this findings in Tribunal decisions 1994 (74) E.L.T. 463 and in Order No. 2329/94-WRB, dated 19-10-1994. The Collector also rejected appellants plea for adjusting capital Modvat credit Under Rule 57Q against the demand saying that they had already utilised it for other commodities.

15. It was also a ground in the show cause notice that cars and LCV/HCV cannot be considered as similar products for purposes of Rule 57F(4) which provides that credit on inputs used in manufacture of products exported under bond shall be allowed; to be utilised towards payment of duty on similar products cleared for home consumption.

16. Shri V. Sridharan, the Id. Counsel for the appellants submitted that even accepting Collector's conclusion that Modvat credit can be allowed only on inputs used in the manufacture of cars, and it cannot be claimed on inputs not used at all in its manufacture; there are other contentions by which appellants would resist the demand. In this context the Id. Counsel contended that LCV/HCV are similar products Under Rule 57F(4) in relation to passenger cars Tata Estate/Tata Sierra.

This view, the Id. Counsel urged, is settled by the majority decision of the Tribunal in the case of Hindustan Motors v. CCE -1996 (87) E.L.T. 216, where the Tribunal has held that the expression 'similar' occurring in Rule 57F(4) has to be interpreted in the context of Modvat credit which is a beneficial legislation for input duty relief. 'Similar' is not to be construed as same or identical, held the Tribunal.

17. Relying upon the same Tribunal decision the Id. Counsel addressed arguments on the additional grounds of appeal that if it is held that cars and LCV/HCVs are not similar products, then the duty credit available for LCV/HCVs exported under bond should be granted as refund to the appellants. That such an alternative is available to the manufacture in circumstances similar to the appellants case, has been upheld by the Tribunal in the decision supra. The Tribunal held that such a claim will not be hit by limitation Under Section 11B of the Central Excise Act. It was therefore pleaded that the amount of duty demand should be determined after taking into account the amount refund due to the appellants on the exports. The Id. Counsel submitted that all the particulars for such determination/adjustment have been furnished for verification and the factum of exports is also not denied by the Department.

18. The Id. Counsel submitted that the Department has permitted appellants to maintain a consolidated RG 23A Part II account right from March, 1986. Instead of changing their stand retrospectively if the Department had put the appellants on notice in May, 1994 itself, they would have worked in accordance within the framework of Rule 57F(4) and ensured that they availed of the refund of duty in terms thereof.

19. The Id. Counsel also pointed out that in regard to the adjustment against Modvat on capital goods Under Rule 57Q, such credit is permissible towards payment of duty on any of the final products manufactured in the factory of the manufacturer and so they can avail of it for payment of duty on passenger cars. This position, the Id.Counsel submitted, has come to be accepted by the Department from December, 1994. Arguments were also addressed to put forth yet another alternate plea that out of opening balance in RG 23A Part II as on 1-4-1994 about Rs. 8.60 crores would represent credit available for payment of duty

on cars which amount of opening balance ought to have been taken into account, it was pleaded whereas the Collector has proceeded on the assumption that no part of the opening balance would relate to car inputs which he has taken as exclusively relating to LCV/HCVs. It was also argued that in any case no mala fides can be attributed to the appellants so as to justify the penalty on them which should be set aside.

20. The Id. SDR Shri V.K. Puri, contended that the appellants are raising the additional grounds regarding eligibility to refund Under Rule 57F(4) for the first time now. It was not raised at any earlier stage of stay application also. Hence the Collector had no occasion to go into it as such a stand had not been taken in their reply to show cause notice.

21. The Id. SDR referred to the meaning of the term 'similar' in Law Lexicon to say that similarity in this context will have to be construed to mean that the credit on exported LCV/HCVs will be available for payment of duty on other vehicles which are similar to LCV/HCVs, and not on cars Tata Estate/Tata Sierra as done by the appellants. Id. SDR in this connection referred to the reasoning in the minority decision of the Tribunal in the case of Hindustan Motors (supra). Similar goods means same goods with various shapes and sizes.

A truck and a motor car are hence not similar goods.

22. It was also urged by the Id. SDR that refund claim before statutory authorities, it is now well settled, can only be made within the limitation prescribed in the statute and subject to fulfilment of the conditions prescribed therefor. The appellants will have to show that they fulfill the conditions in notification issued Under Rule 57F(4) for being eligible for the refund. No such claim in terms of the limitation and conditions thereunder has been made by the appellants.

The Id. SDR contended that refund of duty is one thing and adjustment against duty liability another; the two cannot be equated.

23. The Id. SDR further pointed out that there is no question of adjustment of the demand against capital goods Modvat credit as it has already been utilised and

hence there is no room for subsequent adjustment.

24. On hearing both the sides, we allow the miscellaneous application for raising additional grounds as it arises out of the show cause notice which has alleged that passenger cars and LCV/HCV's are not similar final products for purposes of Rule 57F(4), and the back up material for the grounds now raised are already on record.

25. It has been argued that passenger car is a similar final product for the purposes of first proviso to Rule 57F(4) of the Central Excise Rules vis-a-vis LCV/HCV's. Alternatively, if it is not of listed, it has been urged that credit of duty paid on LCV/HCV's exported under bond has to be refunded to the appellants in terms of second portion the proviso to Rule 57F(4). The appellants rely upon the Tribunal decision in the case of Hindustan Motors v. CCE -1996 (87) E.L.T. 216 for this purpose, which has been followed in the Tribunal decision in the case of Ranbaxy Laboratories v. CCE - 1997 (92) E.L.T. 400.

26. Relevant part of the proviso to Rule 57F (4) of Central Excise Rules reads as follows: "Provided that the credit of specified duty in respect of inputs used in the final products cleared for export under bond or used in the intermediate products cleared for export in accordance with Sub-rule (2), shall be allowed to be utilised towards payment of duty of excise on similar final products cleared for home consumption or for export on payment of duty and, where for any reason, such adjustment is not possible, by refund to the manufacturer subject to such safeguards, conditions and limitations as may be specified by the Central Government in the Official Gazette." 27. In the Hindustan Motors case (supra) proceedings were initiated against appellants therein for recovery of duty alleging that Modvat credit relating to inputs used in manufacture of motor vehicles falling under subheading 8706.20 and 8706.40 of the Central Excise Tariff Act (CETA), i.e. chassis fitted with engines for buses and trucks, was wrongly utilised for payment of duty on clearances of the motor vehicles under headings other (sic) 8706.20 and 8706.40 CETA. The appellants therein resisted the demand that motor vehicles exported and those cleared for home consumption were similar goods, all being motor vehicles falling under Chapter 87 of CETA. It was also

alternatively contended that even assuming that the two categories of vehicles are not similar products, Hindustan Motors would be eligible to the refund of Modvat credit on inputs used in manufacture of exported vehicles.

28. The majority decision of the Tribunal accepted the contentions of Hindustan Motors. It was held, "If the test of 'similarity' is the same heading/sub-heading of the article, it would have been easier for the rule maker to use the expression 'final products' falling under the same heading/sub-heading as that of final products cleared for exports" in the proviso to Rule 57F(3) and express their intention clearly.

Since that has not been done, the word 'similar' needs to be given a wider meaning beyond the concept of headings/sub-headings of the Tariff". The majority decision further held, "similarity need not be complete to satisfy the requirement of Rule 57F(3) since in that case, it will be a case of goods being identical. If similarity angle is overstressed even a motor vehicle, say a car or a bus, may be of different design, size, horsepower and carrying capacity. On that score, it can even be held that two such motor vehicles, say cars, differing in these respects are not similar. (Similarity is a relative concept and phenomenon). The decision against the appellants seems to hold the view that if the motor vehicles exported and those cleared for home consumption fall under the same Tariff sub-heading, then they can be taken as similar, but if they fall under different sub-heading though in the same chapter, they are not similar. This differential treatment does not appear to be justified. If the reference (difference) between the vehicles can be ignored and this be treated a similar if they fall under the same Tariff sub-heading, then there is no reason why such differences cannot be ignored if they fall in the same chapter and if all of them are motor vehicles as per Tariff Entry..."

29. In coming to the above conclusion the majority considered the fact that modvat rules are beneficial provisions to avoid cascading effect of input duty so long as final product is dutiable. The majority noted that Rule 57F(3) is a further liberalisation of that concept in that credit of duty does not lapse even if the final product is not dutiable, as is generally the case in respect of exported goods. The word 'similar' the majority held, has to be interpreted keeping the above back

ground of doubly beneficial provisions of Rule 57F(3).

30. The ratio of the above decision, which we note has been followed by the Tribunal in the case of Ranbaxy Laboratories (supra), is applicable to the facts of the present case. The fact that cars fall under Heading 87.03 and LCV/HCV's fall under Heading 87.04 CETA cannot be the criterion for saying that they are dissimilar final products for the purposes of Rule 57F(4) as they are motor vehicles falling under Chapter 87 CETA. In this view of the matter the credit on inputs used in the manufacture of LCV/HCV's exported under bond during the material period can be utilised for payment of duty on passenger cars Tata Sierra/Tata Estate, being similar products.

31. In such a situation an amount of Rs. 18,05,95,569 representing Mod-vat credit availed on inputs used in manufacture of exported LCV/HCV's during the period in question has to be adjusted against the present demand. The above figure, we are informed, has been verified by the Department. The demand therefore has to be redetermined after adjusting the above amount.

32. In the light of the above conclusion as above, we do not feel called upon to go into the other alternative submissions made by the appellants, including the one relating to their eligibility to refund Under Rule 57F(4), and we find that even in the Hindustan Motors case (supra) it was the submission of HM that they would not actually press the alternative plea regarding refund which, they said, was only their defence against the demand for duty by disallowing Modvat credit.

33. However, while redetermining the demand as directed above, 'the Commissioner may also consider the appellants plea that part of the opening balance in RG 23A Part II as on 1-5-1994 would relate to credit available for payment of duty on cars for which the appellants have furnished various particulars which would require verification and the Commissioner may decide the same on merits after giving opportunity to appellants to state their case on this limited aspect.

34. In the result, the appeal is disposed of by holding that the demand requires to be redetermined on the basis that appellants can pay duty on passenger cars

cleared for home consumption from input duty credit earned on LCV/HCV's exported under bond in terms of Rule 57F(4) of the Central Excise Rules, as these are similar final products. It is further held that while redetermining the demand the appellants plea regarding the correctness of the opening balance in their RG 23A Part II as on 1-5-1994 may be considered on merits by the Commissioner.

35. Consequent upon the above decision on the merits of the case, and as the records show that no mala fides can be attributed to the appellants in this case, the penalty on them is set aside.

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