Modi Cement Ltd. Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Nov-04-1997

Reported in : (1998)(98)ELT230TriDel

Appellant : Modi Cement Ltd.

Respondent : Collector of Central Excise

Judgement :
1. This appeal is directed against the order-in-original dated 8-6-1994 passed by the Collector of Customs and Central Excise, Raipur, confirming a duty demand of Rs. 27,09,267/- from the appellants apart from imposing a penalty of Rs. 50,000.00 on them.

Appellants are manufacturers of cement. They were using HDPE bags made out of jute, paper and plastic strips for packing the cement. According to the appellants, they had filed a declaration on 28-3-1987 under Rule 57G mentioning, among other things, HDPE bags as one of the inputs. At that time there was a dispute about the classification of HDPE bags which came to be resolved by the Board's letter dated 25-9-1992 classifying HDPE bags under Chapter 39 and not under Chapter 63.

According to the appellants, since they were receiving the said bags under Chapter 39 and not under Chapter 63 during the relevant period they could not take any Modvat credit in the RG 23A Part II or enter these bags in their RG 23A Part I, as Chapter 63 was not included in the notification issued under Rule 57A during the relevant period.

According to the appellants, they became automatically entitled to Modvat credit of duty paid on HDPE bags under Chapter 63 from the date of the clarification issued by the Board on 25-9-1992. Accordingly, appellants wrote a letter dated 30-8-1993 to the concerned Range Inspector enclosing a list of purchases along with RG 23A Parts I and II for claiming Modvat credit on HDPE bags used as packaging material.

On 7-9-1993, appellants again wrote to the Assistant Collector claiming that there was no time limit for taking Modvat credit so long as it was proved that the inputs had been received within the factory during the period when Modvat credit was available. The Assistant Collector by letter dated 10-9-1993 informed the appellants that since HDPE bags purchased by the appellants during the years 1988-89, 1989-90 and 1990-91 had not been entered in RG 23A Part I, they could not be allowed to do so since more than two years had elapsed. The appellants thereafter exchanged correspondence with the Assistant Collector seeking to establish that there was no time limit laid down in the Rules for taking or utilising Modvat credit. The Assistant Collector, on the other hand, maintained that the time limit for claiming Modvat credit would be six months having regard to the fact that the time limit for placing demand under Rule 57-I had been held to be six months.

3. On 17-1-1994, Collector of Central Excise, Raipur issued a show cause notice to the appellants alleging that the appellants had taken wrong and illegal Modvat credit during the period 1987-88 to 4-10-1990 that credit was not admissible in view of the exclusion clause in Rule 57A for HDPE bags; that the appellants had not maintained prescribed records, viz., RG 23A Part I and Part II at the time of receipt of HDPE bags. Personal hearing were fixed on 4-4-1994 and 29-4-1994 for which the present appellants sought adjournment. Thereafter the impugned order dated 8-6-1994 was passed by the Collector ex parte.

4. Appearing for the appellants Shri A.K. Jain, ld. Advocate, submitted that the Collector had wrongly held that the benefit of Modvat credit on HDPE bags used as packaging was not admissible. Ld. Advocate also submitted that the Collector had wrongly held that Modvat facility was not available on HDPE bags used for

packing of cement, inasmuch as the appellants had earned the credit prior to 17-9-1990 and the Notification No. 35/90-C.E., dated 17-9-1990 disentitling Modvat credit for HDPE bags for packing of cement did not apply to the period prior to 17-9-1990. In other words, merely because HDPE bags were disallowed as inputs from 17-9-1990 onwards it did not disentitled an assessee from taking and utilising Modvat credit for the goods received during an earlier period. Ld. Counsel also submitted that the Collector had wrongly rejected the request for cross-examination of the officers incharge of the factory on the ground that the cross-examination was requested by the appellants to establish that the goods had in fact been received prior to 17-9-1990 and to show that Modvat credit was admissible during the said period and could be utilised later. In the impugned order the Collector had held that the credit which had been earned earlier could not be utilised subsequently. As regards penalty ld. Counsel submitted-that there was no justification for imposing a heavy penalty of Rs. 50,000.00 in the circumstances of the case. In support of his submissions the ld. Counsel relied extensively on case law and had also submitted written submissions. He relied particularly on the Tribunal decision in J.K. Synthetics Ltd. v. Collector of Central Excise reported in 1997 (92) E.L.T. 150 in which the Tribunal had held that packaging material is not excluded from the purview of input where final product is liable to specific rate of duty. As regards the issue of time limit for taking of Modvat credit, the ld.Counsel referred to the Supreme Court decision in Government of India v. Citadel Fine Pharmaceuticals, 1989 (42) E.L.T. 515 (S.C.) wherein the Supreme Court had held that the expression "reasonable time" can extend even to two years. He also referred to the Apex Court decision reported in AIR 1994 SC 1878 wherein it was held that in cases where no time limit had been prescribed, there can be no valid reason for holding any particular period as mandatory. There was no justification, therefore, for the Collector to hold that six months was the reasonable period for taking Modvat credit. Ld. Counsel further submitted that though in certain cases the Tribunal had taken the view that prior to its amendment the reasonable time limit for purposes of Rule 57G would be six months, the Tribunal had in Collector of Central Excise, Pune v.Associated Flexibles and Wires Pvt. Ltd., 1994 (74) E.L.T. 902 referred the matter to the High Court. The ld. Counsel, therefore, contended that for the period prior to the insertion of sub-rule (5) to Rule 57G, the six month period will not automatically apply and no time limit for taking Modvat credit in RG 23A Part I was actually envisaged before the amendment. He submitted that the appellants had claimed the benefit of Modvat credit of duty paid on HDPE bags which they had received in their factory and used in the packing of cement manufactured by them.

They had also filed a declaration in 1987. Subsequently, when the appellants came to know that they were entitled to the benefit of Modvat credit in respect of their HDPE bags used for packing prior to 17-9-1990 pursuant to the Tribunal decision in Collector of Central Excise, Bhubaneswar v. Orissa Cement Ltd. - 1994 (69) E.L.T. 537 (Tribunal), appellants had, on the basis of the said decision, taken Modvat credit on the basis of the declaration filed by them in 1987 and informed the Department accordingly by their letter dated 30-8-1993.

Even assuming that the limitation period of six months applied in their case, ld. Advocate contended that the said six months period would commence from the date of knowledge of the appellants of the law laid down by the Tribunal for the first time in this respect and for this purpose the limitation period should commence from the date of publication of the judgment of the Tribunal in the case of Orissa Cement Ltd. case, namely, July, 1993. Applying the test of reasonable time limit laid down by the Supreme Court in the case of Citadel Fine Pharmaceuticals (supra) read with the other judgment of the Tribunal holding that the limitation would be six months, even then, the period of limitation would come to an end only in January, 1994, whereas the appellants had taken credit in August, 1993 well within a month of publication of the judgment of the Tribunal in which it had been held for the first time that HDPE bags used for packing cement were entitled to Modvat credit during the prior to 17-9-1990.

5. Shri Y.R. Kilania, JDR appearing for the Department drew attention to the findings of the Collector in the impugned order. He submitted that the appellants themselves; had admitted that they had not filed any duty paying documents for claiming Modvat credit during the period 1987-90. Ld. DR referred to the Tribunal decision in Elgi Equipment Ltd. v. Collector of Central Excise, Coimbatore reported in 1996 (81) E.L.T. 115 and Collector of Central Excise Madras v. Tamil Nadu

Petro Products reported in 1996 (84) E.L.T. 263 which had followed the Apex Court decision in 1989 (42) E.L.T. 515 wherein it was held that reasonable time should be read into all enactments. According to the DR, the relevant date for reckoning the period of six months should be the date of receipt of the inputs. Further, it cannot be said that the instructions issued under Section 35E by the Board would lay down the law. Ld. DR also submitted that the inputs received by the appellants during the relevant period were not eligible for Modvat credit because the said inputs were not Mod-vatable inputs in terms of Rule 57A at the relevant time. In these circumstances, according to the ld. DR, the impugned order suffered from no infirmity and, therefore, may be upheld and the appeal rejected.

6. In the further written arguments filed by the Appellants they have submitted that the matter should not be remanded to the Commissioner to decide the question of the period of limitation for taking Modvat credit as the said issue was not a ground either in the SCN or in the impugned order.

7. We have considered the submissions made on behalf of the parties. On the question of eligibility for Modvat credit of HDPE bags used for packing cement the Collector had held that since cement is assessable to specific rate of duty and the cost of packing material was not included in the assessable value of cement, HDPE bags could not be treated as an 'inputs" under Rule 57A. He had further observed that since under Section 4(4)(d)(i) assessable value excluded the cost of material which is of durable nature and is returnable by the buyer to the assessee the packing material whose cost has not been included in the assessable value of the final product will not be treated as an 'input' for purposes of Rule 57A. Appellants had contended that the assumption that cost of packing was not included in the specific rate of duty for cement was not correct. We note that in Collector v. Orissa Cements Ltd. - 1994 (69) E.L.T 537 it was held that HDPE bags/sacks classifiable under Chapter sub-heading No. 3923.90 was eligible for Modvat benefit when used as inputs and Modvat credit is admissible under Explanation Rule 57A. Relying on the said decision of the Tribunal we hold that the appellants' claim for Modvat credit for HDPE bags used as packing material for cement are an eligible input under Rule 57A at the relevant period.

8. The Collector had held since the appellants had started availing Modvat credit much before the date of submission of RT12 returns, the plea of the appellants that the Deptt. was aware of availment of Modvat credit was not correct. It is not in dispute that the appellants had taken credit on HDPE bags in their RG 23A Part II on 30-8-1993 and had intimated it to the Deptt. as per RT 12 for the month of August, 1993.

As far as the taking of the credit of differential duty at a subsequent date, we find that the Asstt. Collector had held that since the period that had elapsed was almost one year, it was beyond the reasonable period of six months as held by the Tribunal in 1991 (52) E.L.T. 590.

We observe that the Apex Court in Govt. of India v. Citadel Fine Pharmaceutical 1989 (42) E.L.T. 515 held that what would be reasonable time would depend on the facts of each case. The Asstt. Collector had observed in his order that there was no doubt about the eligibility for Modvat credit. Appellants had contended that they had taken credit within six months of the first publication of the decision in CCE, Bhubaneswar v. Orissa Cement (supra). Therefore, even adopting the yardstick of six months as the reasonable period, they had claimed that their claim for Modvat credit was admissible. We are inclined to accept the above submission of the ld. Advocate in the light of the Apex Court judgment in Citadel Fine Pharmaceuticals case (Supra) holding that what is reasonable time would depend on the circumstances of each case.

9. As a result, having regard to the discussions above, we allow the appeal and set aside the impugned order. Appellants will be eligible for consequent benefits under law.