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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Nov-28-1997

Reported in : (1998)(98)ELT199TriDel

Appellant : Pascal Paramount Pvt. Ltd.

Respondent : Collector of C. Ex.

Judgement :

1. Captioned appeal arises from Order-in-Appeal No.104-123-C.E./DLH/95-1922, dated 15-9-1995 passed by Collector of Central Excise (Appeals), Delhi.

2. The matter relates to the question whether an assessee has the choice to opt for Modvat credit when he is eligible to exemption under Notification No. 1/93 as amended. The lower authorities held against the appellants. Hence the appeal.

3. Appellants are engaged in the manufacture of excisable goods falling under Chapter sub-headings, 85.44 and 7408.19 of the Schedule to the Central Excise Tariff Act, 1985. The appellants were served with a SCN dated 30-9-1993 asking them to show cause as to why Modvat credit availed by them during the period 1-6-1993 to 31-8-1993 should not be recovered from them under Rule 57-I for wrongfully availing Modvat credit. The SCN alleged that the appellants, being not registered as a SSI unit with the prescribed authorities were governed by Clause (2) of Notification No. 1/93 dated 28-2-1993 as amended since the goods manufactured by them were exempted from the payment of the whole of duty leviable upon them up to an aggregate on clearances of Rs. 10 lakhs. It was

alleged that since they were statutorily required to clear their goods up to a limit of Rs. 30 lakhs without payment of Central Excise duty and since in terms of Rule 57C no credit of the specified duty on the inputs in or in relation to the manufacture of the final product was admissible if such final products are exempted from the whole of duty of excise leviable thereon or were chargeable to nil rate of duty, no credit of duty could be claimed by them.

4. In reply the appellants admitted the position that they were not registered as SSI unit with the Development Commissioner. However, they contended that though Notification No. 1/93 granted exemption from payment of duty only to units which were registered as SSI with the appropriate authorities. When Clauses (1) and (2) of Notification No.1/93 is read together it would make it clear that the exemption provided in the Notification was basically available only to SSI units registered with the appropriate authorities. However, if the value of clearances during the financial year did not exceed Rs. 30 lakhs registration certificate would not be required for availing the exemption. Further, they had also filed classification list on Modvat declaration under Rule 57G indicating the description of the final product as well as the inputs intended to be used in the manufacture of the final product. The jurisdictional Assistant Collector raised no objection to the appellants availing Modvat facilities and their RT 12 Returns for the relevant period were duly assessed and finalised.

Appellants contended that in terms of Notification No. 1/93 exemption from payment of duty was provided to unregistered units up to Rs. 30 lakhs. This provision should not be construed to mean that there was a prohibition from payment of duty cleared up to a value of Rs. 30 lakhs.

In terms of Clause (2) of the Notification there was no prohibition for an unregistered SSI unit from paying duty on the goods on which exemption had been granted by the Notification. On the other hand, they contended that Notification No. 1/93 actually provided an option to such units either to avail the exemption or to pay duty. Therefore, the allegation in the SCN that there was no such option to the appellants was unfounded. Further, since the goods in question had already suffered duty, there was no question of disallowing Modvat credit on

the duty paid on the inputs used in the manufacture of such duty-paid final product. Hence they contended that Rule 57C was not applicable in their case. It was further contended that the claim of Modvat was in the nature of granting a concession to the manufacturers so that their goods became more competitive. Since Modvat facilities as well as exemption under Notification No. 1/93 were in the nature of granting concessions to a manufacturer, the option has to be left to the manufacturer to choose the best alternative which would suit him.

Neither of the two schemes could, therefore, be compulsorily fastened on a manufacturer. Reliance was placed in the case of German Remedies Limited, Bombay v. Collector of Central Excise, 1987 (28) E.L.T. 144 (Tribunal) and Facit Asia Ltd. v. Collector of Central Excise, 1991 (54) E.L.T. 347.

5. In the initial adjudication proceedings, Deputy Collector after hearing the appellants held that Notification No. 1/93, as amended, issued in exercise of the powers conferred under Section 5A(1) of the Central Excise Act, had become a part of the statute and it left no option to a manufacturer to pay duty in case the goods were fully exempted from payment of duty. Deputy Collector, therefore, held that if a manufacturer chose to pay duty, any amount paid towards such duty will not be treated as duty. In its true sense it can only be treated as a deposit and therefore no Modvat credit can be availed by such manufacturer in respect of duty paid on the inputs going into the manufacture of a final product. Deputy Collector also rejected the appellants' contention that the prohibition under Rule 57C was applicable only in those cases where the duty had actually not been paid on the final product. He held that Rule 57C clearly stipulated that no credit of specified duty paid on the inputs used in the manufacture of the final product shall be allowed, if the final product is exempted from the whole of duty leviable thereon or is chargeable to nil rate of duty. For purposes of Rule 57C it was enough to see whether a final product is exempt from the whole of duty leviable or is chargeable to nil rate of duty. Since in the case of the appellants the final product was exempted from the whole of duty leviable thereon, it has to be considered that the goods were exempted goods and the prohibition contained under Rule 57C cannot be avoided. He also held that Notification No. 1/93 provides a general exemption from the payment of duty to a manufacturer on the basis of the aggregate value of

its clearances up to a certain limit. Further, Notification No. 1/93 did not also envisage that a manufacturer irrespective of the fact whether he was a registered SSI unit or not could avail Modvat scheme and pay duty at a concessional rate up to the initial clearance of Rs. 30 lakhs. This facility was applicable only to those manufacturers who were registered as SSI units and in all other cases full exemption up to Rs. 30 lakhs was available and no credit could possibly be availed of by such manufacturers by resorting to pay duty on such exempted final goods on their own volition.

6. In the Order-in-Appeal, relying on the Andhra Pradesh High Court judgment in the case of Ganesh Metal Processing Industries v. Union of India - 1996 (81) E.L.T. 11 (A.P.) the Collector (Appeals) held that the argument of the appellants that they had option whether to avail of the benefit of Notification or not had to fail. He, therefore, held that as far as Rule 57C is concerned the question whether there was an option to avail of the benefit of exemption under Notification No. 1/93 or whether an assessee has chosen to avail the said benefit or not is of no consequence. On the second question whether after approval of the classification list by the appropriate authority further demand can be raised on such classification list, the Collector (Appeals) held that the argument of the appellants was not legally tenable. He held that the demand for duty in the instant case was not related to the approval of the classification list. Demand in the instant case was in terms of Rule 57C. Since the final product of the appellants were exempted from the whole of duty of Central Excise, no credit of duty on the inputs was admissible to them in terms of Rule 57C.7. Arguing for the appellants Shri Naveen Mallick, ld. Counsel submitted that the question about availability of option for an assessee to avail of exemption under Notification No. 1/93 or any such exemption Notification or to opt for the Modvat Scheme, was now a settled issue. He referred to the decision of the Tribunal in Everest Converters v. Collector of Central Excise, 1995 (80) E.L.T. 91 which had been followed by other decisions the Tribunal. As regards the other question regarding demand of duty under Rule 57-I after the classification list had been approved, the ld. Counsel contended that even for purposes of Rule 57-1 when a classification list along with declaration under Rule 57G had been accepted by the Department without any objection, the demand of duty under Rule 57-I had to be restricted to a reasonable period of six months. It

was urged on behalf of the appellants that even if it was held that their final product was chargeable to Nil rate of duty, the duty already paid should be refunded to them. The net result of the credit of duty already taken would be that such credit earned cannot be utilised. There was no case of the Department becoming entitled to take back such credit. Rule 57-I was, according to the ld. Counsel for the appellants, not applicable in their case.

8. For the Department, Shri Y.R. Kilania, ld. JDR, appeared and reiterated the Department's case as contained in the impugned order.

9. We have considered the submissions made before us and have perused the records.

10. On the question whether an assessee had an option either to choose for an exemption available under a Notification issued under Section 5A of the Central Excise Act or to avail the Modvat credit facility under the Modvat Scheme, the legal position has been settled by the recent decisions of the Tribunal, among others, in Everest Converters, supra, and the following other cases, viz, -Gothi Plastic Industries v. Collector of Central Excise, 1996 (83) E.L.T. 123;Mechiv Engineers v. Collector of Central Excise, 1997 (20) RLT 200; and In Everest Converters case, supra, the Tribunal had observed that the power to exempt is a beneficial power and exemption notifications cannot be forced upon an assessee if the assessee does not wish to avail of the exemption. If an assessee claims the benefit of an exemption he cannot be denied the same so long as he fulfils the terms of the notification. However, it is also to be noted that the assessee has to claim the concession. Where he has not claimed it, the exemption cannot be extended to him. Where the exemption is dependent on any condition also, no exemption will operate where the conditions are not satisfied. In cases where the exemption was granted on the basis of criteria such as the status of the assessee (whether it is a SSI unit or not) or on the condition of volume of clearances or the value thereof, the embargo of Rule 57C would not automatically apply. In the instant case the Notification under examination exempted the goods from duty, or allowed the concessional rate of duty when manufactured by SSI. Admittedly, the assessee in this case was not a registered unit.

Having regard to the rationale of the aforesaid decisions, we agree with the submissions made on behalf of the appellants that it was for the appellants to exercise their option in favour of either the exemption Notification or the Modvat Scheme. In the facts of the instant case where the appellants are admittedly not registered for purposes of claiming benefit under Notification No. 1/93, there could be no question of their being compelled to operate under the said Notification. They cannot also be denied the option of paying duty on the inputs and claiming Modvat credit for their clearances. In such a situation there is no justification invoking Rule 57-I for demanding duty.

11. As regards the maintainability of the SCN under Rule 57-I, in the facts and circumstances of the case we are in agreement with the submissions made on behalf of the appellants that no demand for wrong availment of Modvat credit can be raised on the appellants, having regard to the fact that the appellants have already paid the duty of excise on their inputs.

12. In view of the above, we allow the appeal and set aside the impugned order with consequential benefits, if any, to the appellants in accordance with law.

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