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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Tamil Nadu

Decided On : Dec-12-1997

Reported in : (1998)(102)ELT687Tri(Chennai)

Appellant : Commissioner of C. Ex.

Respondent : Towers and Structurals Pvt. Ltd.

Judgement :

1. The issue in the appeal relates to grant of Modvat credit in respect of goods which were earlier received by the respondents under Rule 57F(2) from the supplier of the raw materials for job work to be done and subsequently in respect of which duty was required to be paid as the respondents did not return the goods received by them after the job work to the principal supplier of the raw materials due to subsequent circumstances.

2. The ld. Original authority did not give the benefit of Modvat credit to the respondents while asking the supplier of raw material M/s. S and S Power Switch Gears Ltd., in the present case, to reverse the Modvat credit in respect of goods which were sent by them to the respondents.

3. Consequent on payment of duty on the inputs which were received by the respondents from M/s. S and S, the respondent took Modvat credit based on the certificate issued by the Inspector of the range concerned and which was subsequently backed-up by the certificate issued by the Superintendent concerned. The ld. Original authority has taken objection to the validity of

certificate issued by the Inspector. The ld. Original authority, in this context, while denying the benefit of Modvat credit to the respondents has held as follows:- (i) If any inputs sent for job work under Rule 57F(2) [now 57F(3)] are not received back into the factory, Modvat credit taken on such inputs must be expunged in terms of Rule 57-I(2). Therefore, the amount of Rs. 3,14,999.07 paid by M/s. S & S pertains to the Modvat credit taken on the inputs cleared to the assessee in semi-processed condition under 57F(2).

I am inclined to infer that the goods received by the assessee for job work were in semi-processed condition since 57F(2) does not provide for clearance for job work of finished goods since the goods were in semi-processed conditions, there is no question of payment of duty on those goods.

(ii) Rule 57E comes into play only when certain duty is discharged, (and later varied) on the finished goods which are inputs for another manufacturer. It does not cover the expungment of credit of duty taken on the inputs. Even if the inputs have been cleared as such, duty is paid thereon in terms of Rule 57F(i)(ii).

Therefore, 1 am inclined to observe from the situation described above, that the duty paid by M/s. S & S is neither a differential duty (since no duty has been discharged in the first instance) nor duty paid (or payable) at the time of clearance of the said goods to warrant a certificate under 57E. Instead, the assessee could have filed a refund claim on the duty paid erroneously on the processed goods received under 57F(2) procedure. Hence, I hold that the Duty Certificate under 57E produced by the assessee is not valid in this case for the purpose of allowing/taking Modvat credit and hence the credit taken is not in order." 4. The ld. Lower appellate authority, however, in his order in para 6 has held as under:- "Coming to the subject appeal, had the inputs been removed as such by M/s. S & S Switch Gears and was not expected to come back to the factory of S & S Switch Gears Limited, this would have been covered by Rule 57F(1). Because, it was expected that the input, after some process by the appellants, was to be returned to the sender it came under Rule 57F(2). As it turned out, the inputs were not returned after the process back to M/s. S & S Switch Gears Limited.

Therefore, the removal came under Rule 57F(1) and duty was paid by M/s. S & S Switch Gears. The appellants would have been entitled to Modvat credit, in the normal course if the inputs had come to them directly under Rule 57F(1) i.e. input removed as such. The only difference now was that initially it was removed under Rule 57F(2), now converted as 57F(1). Thus, so long as the credit (which is now being claimed) is relatable to the, inputs actually received by the appellants and also used in the manufacture of the final product, which are liable to payment of duty, the credit cannot be denied.

It makes no difference whether the initial duty was NIL and that duty is recovered in full later on or part duty was paid earlier and only differential duty was recovered subsequently, since Rule 57E permits adjustment of credit wherever the duty paid is varied subsequently due to any reason. Therefore the AC's decision to deny credit under Rule 57E is not correct. Whether he calls it credit under Rule 57E or under Rule 57A it is merely a change of label and not of substance. The AC's order therefore cannot be sustained in law and has to be vacated. The case laws cited by the appellants also emphasise the point that the Modvat credit is admissible in respect of duty payment effected subsequent to the stage of clearance so long as the payment of duty is correctly authenticated." 5. The ld. JDR Shri Rama Rao for the department has pleaded that apart from the certificate being not by the competent authority initially, the respondents could not have availed of the Modvat credit as proviso to Rule 57E did not cover the contingency as in the present case. He has pleaded that the goods were originally received without payment of duty and no Modvat credit in respect of same was taken and it is on account of subsequent events that the duty in respect of the goods which were cleared under Section 57F(2) was required to be paid by reversal of the Modvat credit which was taken in respect of goods by the supplier of raw material/components namely M/s. S & S Power Switch Gears Ltd. 6. He has pleaded that since originally no Modvat credit was taken, the question of variation of the same in terms of Section 57E would not arise. He has therefore pleaded that the ld. Lower appellate authority's order was not sustainable in law.

7. He has also pleaded that no declaration as such has been filed by the respondents.

8. The ld. Advocate for the respondents has pleaded that this Bench of the Tribunal in a number of cases has held that where initially Modvat credit had not been taken and subsequently duty had been demanded in respect of finished goods, the Modvat credit in respect of inputs could be allowed notwithstanding the non-filing of declaration. He has pleaded even where in respect of certain products initially no credit is taken for reason of non-payment of duty in respect of inputs subsequently credit has been allowed by the Tribunal in the case of CCE v. SAIL reported in 1990 (47) E.L.T. 389 and also in the case of Larsen and Toubro v. CCE reported in 1990 (50) E.L.T. 312. He has pleaded that the ld. Lower authority has correctly interpreted the law and the appeal of the Revenue has no merits.

9. He has pleaded that the charge for demand of duty was originally framed that the certificate on the basis of which Modvat credit was taken was issued by the Inspector of Central Excise and who was not a competent authority. He has pleaded that the issue could not have been enlarged by the ld. Original authority as provisions of Rule 57E were not at all invoked in the show cause notice. In this connection, he referred to the Show Cause Notice. In the SCN, following has been set out:- "Whereas it appears that the assessees have taken credit on the strength of a document which is not a document prescribed under Rule 57G(2) inasmuch as the Certificate was not issued by the competent authority, is not in order and thereby contravened the provisions of Rule 57G(2) of Central Excise Rules, 1944.

Therefore M/s. Towers and Structurals Private Limited are hereby called upon to Show Cause to the Assistant Collector of Central Excise, Madras X Division, No. 110, Nelson Manickam Road, Aminjikarai, Madras 29 as to why the credit of Rs. 3,14,999.07 taken by them on 28-4-1994 should not be required to be expunged in their RG 23A Part II on where the credit has already been utilised why the amount equivalent to such credit should not be recovered from them under Rule 57-I of Central Excise Rules, 1944 and why a penalty should not be imposed on them under Rule 173Q (b)(b) of Central Excise Rules, 1944, for contravention of Rule 57G(2) ibid." 10. He has pleaded that the ld. Original authority therefore was in error in having passed an order on consideration other than on the points raised in the SCN.11. I have considered the pleas made by both the sides. I observe that the issue was raised in the context of the validity of the certificate under which the

Modvat credit was taken by the respondents. The said certificate was issued by the Inspector of Central Excise.

Subsequently, the certificate issued by the Superintendent was produced. This certificate issued by the competent authority having been produced the controversy should have rested there. However, the ld. Lower authority having issued the SCN, it appears, felt compelled to further examine the matter and brought in other elements for holding against the respondents. This could not have been done without putting them on notice. On this ground alone itself, the ld. Original authority's order has to be held to be bad. The ld. Lower appellate authority, however, has not adverted to this aspect. The ld. Lower authority has however dealt with the points which have been taken note of by the ld. Original authority other than those which were raised in the SCN. Even on this point, the respondents have a good case.

12. It is observed that this is a case where originally the inputs cleared from M/s. S & S were sent to the respondents for manufacture of goods on job work basis and M/s. S & S did not pay the duty or reverse the Modvat credit attributable to those inputs. However, subsequently, the provisions of Rule 57F(2) for removal of goods without payment of duty were not fulfilled and M/s. S & S paid the duty, as required under law, attributable to the inputs which were earlier cleared without payment of duty. The respondents were functioning under Modvat scheme as seen from the facts in the ld. Lower authority's order and therefore claimed the benefit of Modvat credit in respect of inputs which had suffered duty. Evidence of payment of duty produced by them was a certificate issued by the Inspector of Central Excise. The Inspector as has been brought out in the order of the ld. Lower authority was not a competent authority for issuing the certificate at the relevant time.

The respondents, however, obtained the certificate thereafter issued by the Superintendent. It is not the case of the department that this certificate issued was not a valid certificate. In a situation like this, where an assessee functioning under the Modvat scheme and the duty in respect of inputs is paid subsequent to the receipt of the same, the question that arises is whether the assessee would be entitled to the Modvat credit.

13. It is seen in the present case, the circumstances under which the duty was required to be paid arose subsequent to the clearance of the goods from M/s. S & S as the goods which were sent without payment of duty same could not be urged by the respondents. In such an event, when the final product had been cleared on payment of duty by the respondents, in respect of the inputs used therein when they were functioning under the Modvat scheme they were therefore entitled to the Modvat credit notwithstanding the non-filing of declaration in respect of those goods. This Tribunal in a number of cases has held that where the duty is asked to be paid subsequent to the clearance of the goods, Modvat credit in respect of inputs which were used in respect of those goods, would be available. Here, it is the other way round. Here the inputs which were received did not suffer duty but the finished product suffered duty. When the inputs did not suffer duty and the duty was charged subsequently, the law provides under Rule 57E for variation of the Modvat credit in the event of recovery of duty in respect of inputs subsequently. Therefore, when the law provides for such contingency, there is no reason why in a case like this, the provisions of Rule 57E should not be made available. As it is the exercise in this case is revenue neutral. M/s. S & S have paid duty payable in respect of goods in question and it is that amount which is taken as Modvat credit by the respondents. There is no loss of revenue to the Government as such.

In view of above, I hold that there is no merits in the appeal of the Revenue and the appeal is therefore dismissed.

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