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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jun-16-1998

Reported in : (1999)(105)ELT216TriDel

Appellant : Smithkline Beecham Consumer

Respondent : C.C.E.

Judgement :

1. This appeal has been filed against the Order-in-Original, dated 30-4-1996 passed by the Commissioner of Central Excise, New Delhi by which a duty demand of Rs. 18,03,484.00 was confirmed against the appellants herein and a penalty of Rs. one lakh imposed. The matter relates to disallowance of Modvat credit on the ground that malted food extracts called "DMI-70" manufactured by the appellants were not in fact used as an input in the manufacture of the appellants' final products, namely, malted food products "Horlicks" and "Boost" classifiable under Chapter subheading 1901.19 of the Schedule to the Central Excise Tariff Act, 1985.

2. The appellants operate two factories, one at Nabha in Punjab and another at Ballabgarh near Faridabad in Haryana. Both the factories use duty-paid raw materials in the manufacture of final products in terms of declaration made under Rule 57G of the Central Excise Rules, 1944 for taking Modvat credit on the inputs. They manufactured DMI-70 at their Nabha factory and cleared them after payment of duty in 29 kg.

bags to their Ballabgarh factory. In his declaration under Rule 57G at the Faridabad factory, they declared DMI-70 as an input for the manufacture of final product with the same name and packing.

3. By two show cause notices dated 4-10-1995 and 7-3-1996, the Department alleged that as per their raw material account in Form IV and inputs account in RG 23A Part I, the said input was not shown as having been issued for any final product nor was any final product shown as manufactured. The records showed the inputs were shown as issued for export to Sri Lanka under bond as their final product in the same packing of DMI-70. No daily stock account in RG 1 in respect of the said product has also been maintained. Since duty paid on DMI-70 was taken as Modvat credit and utilised for payment of duty on their other final products, 'Boost/Horlicks', when it was not in fact used, credit taken during two periods viz. 1-3-1995 totalling Rs. 18,03,484.00 was sought to be recovered under Rule 57-1.

4. We have heard Shri V. Sridharan, Id. Advocate for the appellants and Shri P.K. Jain, Id. SDR for the Revenue.

5. Ld. Counsel submitted that the DMI-70 was meant for export to Sri Lanka and had to satisfy strict quality tests. For this purpose, the goods had to be transferred to their Ballabgarh factory as the Nabha unit did not have the requisite facility. First, the packings were subjected to organoleptic evaluation for ascertaining the microscopic nature of the product, the bags were thereafter opened in dehumidified temperature, representative samples taken for purposes of certifying that the goods were fit for direct human consumption and marking made to recommend clearance for export. While the untested DMI-70 was accounted for in Form. IV/RG 23 A, tested DMI-70 was accounted for in RG 1. The tested DMI-70 was thereafter cleared under bond. According to the appellants the elaborate processes undertaken by the appellants amounted to 'manufacture' in terms of Section 2(f) of the Central Excise Act, 1944 since the DMI-70 cleared for export was a product distinct and different from the untested DMI-70 and inasmuch as the untested DMI-70 was an input in relation to the manufacture of the final product, credit taken on the duty paid untested DMI-70 was in order. Further, since the

goods were exported, appellants were entitled to cash refund under Rule 57F(4) in terms of which credit of duty paid on the inputs used in the manufacture of final products exported is available as cash refund. Instead of obtaining cash refund, they had only taken credit of the said amount and utilised it for payment of duty on the final product. There was, therefore, no loss of Revenue.

Ld. Counsel further submitted that the appellants are even otherwise eligible for rebate of the said duty under Rule 12 of the Central Excise Rules, 1944 since the goods in question had been exported. The Commissioner had rejected their claim on the ground that the claim is not valid for Ballabgarh Unit and the claim, if any, has to be made from the officer having jurisdiction over the Nabha factory. Ld.

Counsel contends that the amount of credit taken at Ballabgarh Unit relates to the duty paid by the Nabha Unit and therefore, the rebate of duty paid can be claimed even if it is availed from the Ballabgarh Unit. He also questioned the Commissioner's finding that the rebate claimed cannot be a ground not to recover the amount of credit which is otherwise not admissible to the appellants. The appellants have contended that since the said amount was available to them as rebate under Rule 12, the question of making the payment first and claiming it thereafter was only an arithmetical exercises. Ld. Counsel submitted that the provisions of Rule 12A and the notification issued thereunder make it clear that the duty paid on DMI-70 at Ballabgarh Unit was available to them as rebate. Further, Explanation 1 to Rule 12 defines the expression "manufacture" as including the process of blending of any goods or making alternations or any other operations thereunder.

Rule 12 therefore indicates that rebate is available not only on duty paid on the excisable goods exported but also of the duty paid on materials used in blending or making alternations or any other operations. Notification No. 41/94 as amended clearly provided for rebate of duty paid on the excisable goods for export. The notification contained only the condition that the excisable goods shall be exported after payment of duty and that such excisable goods shall be exported within six months from the date on which they were cleared for export and further that the claim for rebate of duty together with proof of exportation had to be filed within the

time specified under Section 11B. The appellants also referred to Notification No. 42/94 as amended which provided for rebate on materials used in the manufacture of goods for export. In terms of the said notification also rebate of duty paid on untested DMI-70 was available since such DMI-70 was ultimately exported. They also referred to Rule 13 of the Central Excise Rules which provides for removal of materials without payment of duty for manufacture of goods for export and the expression "material" has been given in Explanation 2 of Rule 13 to include raw-materials, consumable etc. used in the manufacture of goods exported.

6. The Departmental representative Shri P.K. Jain submitted that the question for consideration was not whether the appellants were entitled to rebate under Rule 12 or other relevant Rules but whether DMI-70 transferred from the appellant's Nabha factory to Ballabgarh factory had been used for the manufacture of their final products namely 'Hor licks/Boost' cleared by the appellants for home consumption for entitling them to use the duty paid for DMI-70 for payment of duty for the clearance of Horlicks/Boost. Admittedly the DMI-70 transferred from Nabha to Ballabgarh had not been utilised for the manufacture of Horlicks/Boost in their Ballabgarh factory. This was violates the provisions of Rule 57F(1)(i). He drew the attention of the findings of the Commissioner to the effect that Modvat rules are not applicable at all in the present case inasmuch as their product DMI-70 was ultimately exported under Bond. The appellant's claim for the benefit of the proviso to Rule 57F(4) was not available to the appellants. In view of these facts, the appellants were clearly not entitled to take Modvat credit on the duty paid on DMI-70 on the quantity transferred by them from Nabha to Ballabgarh. Ld. DR also submitted that the Commissioner had rightly observed that if the appellants had any difficulty in exporting the product from their Nabha Unit without payment of duty, it was for the appellants to approach the appropriate authorities and seek a remedy for the same within the frame work of the Rules instead of resorting to availing Modvat credit and later on claim the said amount as rebate in the alternative.

7. We have considered the submissions. It is clear from the adjudication order that the appellants have claimed Modvat credit facility for DMI-70 transferred by them from their Nabha Unit to their Ballabgarh Unit without having utilised the said

product as input for their final product Horlicks/Boost. Admittedly the said DMI-70 had been put through several processes at the Ballabgarh Unit before they were exported. We are however, unable to accept the contention of the appellants that the process of dehumidification, organoleptic evaluation, etc. have transferred the untested DMI-70 into a new product or that the said processes would amount to manufacture. The appellants themselves have conceded that what they have exported also was DMI-70. As regards the contention of the appellants that they were eligible for rebate for the goods exported, we find that the issue does not relate to eligibility or otherwise of the quantity of DMI-70 exported by the appellants for rebate but the making use of the duty paid inputs transferred from Nabha to Ballabgarh for purposes of Modvat credit. In the facts of the case, we agree with the finding of the lower authority that the claim of the said goods for rebate cannot be a ground not to recover the amount of Modvat credit which was not admissible to the appellants. We, therefore, confirm the order of the Commissioner as regards the duty demand. However, having regard to the overall circumstances of the case, we reduce the penalty from Rs. one lakh to Rs. 10,000/-.

8. But for the above modification, the impugned order is confirmed and the appeal is disposed of in the above terms.

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