

**Voltas Limited Vs. Cce**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

**Decided On :** Mar-24-1999

**Reported in :** (1999)(83)LC798Tri(Mum.)bai

**Judge :** S Bhatnagar, Vice-, A Unni

**Appellant :** Voltas Limited

**Respondent :** Cce

**Judgement :**

1. This is an Appeal against the order of Collector of Central Excise, (Appeals), Bombay dated 10.9.1990 by which Special Excise Duty to the tune of Rs. 4,873.44 for the period July, 1988 to February, 1989 was held to be payable by the appellants. The question relates to the liability to pay Special Excise Duty (SED) in respect of goods manufactured prior to the Budget period (when no SED was applicable) but cleared under Rule 57F(1)(ii) after the Budget.

2. When the matter was called none appeared for the appellants. From the record it is seen that appellants by their letter dated 26.2.1998 had stated that they would not be appearing either in person or through an Advocate and the matter may be decided on the basis of their Appeal Memo, and the submissions made therein.

3. We have heard Ld. D.R., Shri S.N. Ojha and have perused the papers.

On careful consideration of the matter we find that the Appeal has merit. The same is accordingly allowed for reasons recorded hereunder.

4 Appellants who are manufacturers of various types of machinery receive duty paid inputs for use in the manufacture of their final products. Some of these bought out items, apart from being used in the manufacture of final products, are also sold as spares. During the period July, 1988 to February, 1989 Appellants sold certain bought out items as spares. On examination of RT-12 returns for the period the Range Superintendent returned the RT-12 Memoranda with the endorsement that SED was payable in respect of bought out items sold as spares.

Appellants contested the demand and claimed that in the instant cases they were merely buyers of the items and not manufacturers. The goods were purchased, in the years 1986, 1987 and 1988 when no SED was applicable. They argued that SED was introduced only by Section 82 of the Finance Act of 1988. Since the goods were purchased when no SED was in force no liability to pay SED arose in the case of bought out items cleared as spares. Range Supdt. however, rejected their contentions and by order-in-Original dated 5.4.1990 confirmed the demand. In Appeal, Collector (Appeals) held that under Rule 57F(1)(ii) the receiver of the inputs is treated as a manufacturer and the proviso implied that excise duty at the credit and debit stages could be different. Appellants had drawn attention to and relied on the Tribunal's Final Order in Appeal No. E/1972/90B in their own case in which the Tribunal, relying on the Apex Court judgment in Ponds (India) Ltd. v. CC dismissed Departmental Appeal relating to demand of SED for goods manufactured on or before 29.2.1988. Ld. D.R. however drew attention to the fact that the facts of the present case were different from the facts in Ponds (India) case inasmuch as no question relating to clearance under Rule 57F(1)(ii) was considered in that case.

5. We find that the main contention raised by the appellants in the Memo of Appeal is that excise duty liability arises when goods are manufactured and a manufacturer becomes liable to pay the duty at the applicable rate prevalent on the date of clearance of the goods. In the instant case the concerned manufacturer had discharged the duty liability by paying the duty at the rates prevalent on the date of clearance. At that time no SED was paid since no SED was in force. The goods cannot be subjected to any higher duty than the duty paid at the time of the first clearance. Further, under the Modvat Scheme duty liability borne originally by

the inputs cannot be subsequently increased or decreased. They have further argued that the Supreme Court decision in Wallace Flour Mills case relied on by the Supdt. was not applicable in the present case since in that case the question considered was whether the benefit of exemption which had been withdrawn at the time of clearance could still be availed. It was held that liability to pay excise duty arises at the time of clearance and since the duty was payable in respect of the goods on the date of clearance the goods must bear the burden of applicable excise duty at the time of such clearance. In the case of the appellants, it was submitted, the issue related to Modvat credit taken in respect of certain goods. Some of these goods which were purchased from various parties in India had suffered the basic excise duty and the appellants had taken credit for such duty while availing the benefit of the Modvat scheme. Some of the goods for which credit was taken were imported goods and the credit taken was in respect of countervailing duty. In the case of imported goods the question of applicability of SED did not arise at all. The Hon'ble Supreme Court decision in Wallace case was not an authority for the proposition that the goods can be subjected to any duty higher than the duty borne at the time of the first clearance at a subsequent stage. They also contended that Rule 57F(1)(ii) did not provide that payment of duty can be more than the credit taken. The proviso to Rule 57F(1)(ii), according to the appellants, did not provide that payment of duty can be more than the credit taken. The proviso referred to cases where higher credit was taken at the time of receipt of the inputs and at the time of clearance the rates had been reduced. The burden of excise duty could not be reduced at any later stage and the proviso to Rule 57F(1)(ii) merely reiterated this aspect by clarifying that even if the rate of duty prevalent at the time of diversion of the goods for home consumption was different and lower, the basic duty liability will not change.

6. We find that it is not in dispute that the appellants had taken credit of the duty paid on the inputs received by them. It is also not in dispute that in terms of Rule 57F(1)(ii) inputs in respect of which credit of duty had been taken can be removed for home consumption only subject to the prior permission of the Collector and on payment of appropriate duty of excise as if such inputs had been manufactured in the factory. Proviso to the said rule also says that where the inputs are removed from the factory for home consumption on payment of duty of excise, such duty of

excise shall in no case be less than the amount of credit that has been allowed in respect of such inputs under Rule 57A. Collector has held that Rule 57F(1)(ii) treats the receiver of the inputs as manufacturer and the proviso implies that the duty of excise can vary at the credit and debit stage.

7. We find that the question as to what is the 'appropriate duty of excise' referred to in Rule 57F(1)(ii) has been considered by the Larger Bench of this Tribunal in CCE, Coimbatore v. American Auto Service and the Tribunal had by a majority taken the view that the expression "appropriate duty of excise" used therein has to be taken as the rate of duty which the receiver of the inputs suffered at the first instance and it cannot be read to mean 'effective rate of duty' as prevalent at the time of clearance of inputs for home consumption. The majority judgment had explained the rationale of Rule 57F(1)(ii) and had observed that the said rule by placing a burden on the user to make the payment of duty a legal fiction has been created by which the user of the inputs is considered as the manufacturer for purposes of recovery of the credit already utilised by him on such inputs. The majority view was: This is a requirement for payment of duty on the inputs removed for home consumption, as at the stage of its removal, the duty which it had suffered, has already been utilised by the user of input.

Therefore, in order to undo this act, the duty which the input had suffered earlier, is required to be paid back, even if the duty had been reduced at a level lower than the rate at which duty had been paid by the original manufacturer. The proviso to Rule 57F(1)(ii) makes this aspect clear. Therefore, the Rule directs the user of the input to maintain the level of rate of duty, even if rates of excise duty have come down. This same benefit availed by revenue is also required to be granted to the user of inputs when the rates go up by recovering only the rate of duty utilised by him at the time of taking credit. Therefore "appropriate duty of excise" has to be taken as the rate of duty which he suffered at the first instance and it cannot be read to mean "effective rate of duty" as prevalent at the time of clearance of inputs for home consumption. The view expressed in the SAE India Ltd. 's case is required to be accepted and followed. This view appears to have been the understanding of the department also, as can be seen from the Trade Notices referred to before us....

8. Following the Larger Bench decision extracted above, we set aside the impugned order and allow the Appeal.

9. I would only like to draw attention to the minority view expressed in the case of American Auto Services (supra) relating to the same issue: The words used in Rule 57F(1)(ii) do not leave any doubt that the legislature intended these goods in respect of which Modvat has been taken to be considered as goods as if the same had been manufactured in the factory where the same were brought in as inputs in case these were to be cleared for home consumption or for export. These words have been used deliberately to bring in the concept that the goods in respect of which Modvat Credit has been taken are restored to the status of the excisable goods on which duty had yet to be paid and for the purpose of working out the quantum of duty the same have to be treated as the goods manufactured in the factory. Once these goods after the Modvat credit has been taken are restored to the status of non-duty paid goods it will be like any other goods manufactured in a factory where incidence of duty is postponed till their clearance outside the factory for home consumption or for export and the relevant date for the purpose of valuation and classification would be the date on which the same were cleared from the factory as per the provisions in the Central Excise Act and Rules.

10. I would also like to add that subsequently Rule 57F was amended and the Clause "as if such inputs have been manufactured in the said factory" were deleted and the Rule was re-casted to include inter alia the following words: (a) on payment of duty equal to the amount of credit availed in respect of such inputs; This shows that during the period the unamended Rule 57F was in force, the clause "as if such inputs have been manufactured in the said factory" was required to be given effect to in the way the department has pleaded and indicated in the minority view.

11. Once the Government made up its mind to remove the clause and allow removal of inputs for home consumption on payment of duty equal to the amount of credit it deleted the clause in dispute and made the position clear but during the period the disputed clause was in force it could not be ignored and the deeming fiction created by it was required to be operationalised.

12. However, following judicial discipline, I agree with my Ld.

Colleague that it is the majority view in the Larger Bench decision which is required to be followed. Accordingly, the impugned order is set aside and appeal allowed as already announced in the Open Court.

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