

Bansali Engineering Polymers Vs. Commr. of C. Ex.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Oct-07-1999

Reported in : (2000)LC32Tri(Delhi)

Judge : S T G.R., a Unni

Appellant : Bansali Engineering Polymers

Respondent : Commr. of C. Ex.

Judgement :

1. These are two ROM applications - one filed by the assessee and the other filed by the Revenue. There is one reference application also filed by the Revenue stating that a point of law arises out of the decision of this Tribunal contained in its Final Order No. A/546/98-NB, dated 10-7-98 [1999 (105) E.L.T. 213 (T)].
2. We have heard the arguments adduced by Shri J.P. Kaushik, Id.Counsel for the appellant/assessee and Shri S. Srivastava Id. DR appearing for the Revenue.
3. The assessee's counsel submits that while arguing the case before the Tribunal, he had specifically stated that penalty was not warranted and had cited the case law reported in [1997 (96) E.L.T. 398 (T) = 1997 (22) RLT 551] in which the Tribunal had held that "in the background of what we have held above, I hold that the benefit of Modvat credit as held by the Bench in the case of Humidifire Unit available for the airconditioners. The appeal of the Revenue is therefore, allowed in the above terms. The order of the adjudicating authority is restored as prayed

for. In the facts and circumstances of the case, I hold no penalty was warranted as the question of Modvat credit involve the interpretation of the definition of the capital goods under Rule 57Q and no mala fides can be attributed to the respondents in this regard.

I therefore, upheld the order of the Id. Lower authority so far as the setting aside of the order of penalty is concerned". Ld. Counsel further submitted that the Tribunal again in the case of Madras Cement Ltd, v. CCE, Hyderabad reported in 1998 (99) E.L.T. 395 (T) = 1997 (23) RLT 855 held "so far as the levy of penalty is concerned, since the question involved relate to eligibility or otherwise of the Modvat credit, we observe, in the facts and circumstances of this case, the penalty levied was not warranted and we therefore, set aside the order of the lower authorities in this regard." Ld. Counsel submitted that in view of these two judgments of the Tribunal and in view of the fact that the issue of imposition of penalty was contested in the appeal, no order was passed by the Tribunal on the issue. He therefore, prayed that the order of the Tribunal may be rectified. 4. Shri S. Srivastava, Ld. DR draws our attention to Rule 173Q(1)(2b) and submits that taking of credit wrongly attracts levy of penalty. He emphasised on the word 'wrongly' and submits that no mens rea is necessary to be established.

He submits that since in the instant case modvat credit was wrongly taken, therefore, penalty was imposable. He referred to the decision of this Tribunal in the case of Fuji Retrographic Industries v. CCE reported in 1993 (68) E. L. T. 883. In this case, this Tribunal has held "a penalty of Rs. 20,000/- has been imposed on the appellants by the Additional Commissioner under Rule 173Q. However, ingredients of the offence has been spelt out in the notice. No such rule thereof has been mentioned. Said Rule (1)(bb) is attracted in this case. This renders a manufacturer who takes credit of duty in respect of inputs wrongly, liable to penalty not exceeding 3 times the value of the goods in respect of which the contravention has been committed. Denying credit of duty under Rule 57A in excess of permissible amount is taking credit wrongly, irrespective of whether they know or had reason to believe was not permissible. Such a knowledge or belief is not an ingredient for attracting penalty under the first part of said sub-rule which only refers to wrong taking of credit". Ld. DR had therefore, submitted that since there

was a contravention of the Rules inasmuch as Modvat credit was wrongly taken. Therefore, there was no mistake.

5. We have heard the submissions of both the sides. We note that the facts in this case relied upon by the Id. DR are different inasmuch as credit of duty of a smaller amount was eligible on the inputs whereas the manufacturer had taken the credit of the entire amount of duty paid on the inputs. In the instant case the facts are different and therefore the case cited by the Id. DR is easily distinguishable.

Having regard to the decision of this Tribunal in the case relied upon by the assessee we hold that a mistake has crept in the order of the Tribunal. Therefore, the ROM filed by the assessee is allowed.

Tribunal's order is modified by introducing Para 6(a) before Para 7 of the impugned order reading as "in view of the facts and circumstances of the case, imposition of penalty is not sustainable and therefore, the impugned order is set aside insofar as the imposition of penalty is concerned." 6. The ROM filed by the Revenue pertains to the finding of the Tribunal in paragraph 6(1) of the impugned order. This paragraph reads "item No.(i) in these being materials used for fabrication of storage tanks, we agree with the finding of the lower authorities and hold them as not eligible for Modvat credit under Rule 57Q". Whereas while finally passing the order in para 8, the Tribunal recorded "as a result, we allow the Modvat credit on item (i), (ii) and (iv) above. We note that a mistake has crept in, in respect of item (i) inasmuch as it has been held that Modvat credit is allowed. Therefore, para 8 of the impugned order is amended to read as "as a result, we allow the Modvat credit on items (ii) and (iv) above, appellants will be eligible for consequential benefit." 7. Revenue has also filed a reference application stating that a point of law arises which as formulated by the Revenue is "Whether the items namely S. S. Plates, S. S. sheets, electric items and filled tanks can be said to fall within the definition of capital goods under Rule 57Q of Central Excise Rules, 1944 at the relevant time and accordingly availed credit as provided under the said rules".

8. Arguing the reference application, Shri Sanjeev Srivastava, Id. DR submits that with allowance of the ROM, the point of law needs reformulation. He submits that

point of law shall now read whether electrical items and oil tanks can be said to fall within the definition of the capital goods under Rule 57Q of Central Excise Rules, 1944 at the relevant time and accordingly availed credit as provided under the said Rules. He submits that in so far as the electric wires are concerned, reference has already been allowed by the Tribunal in respect of electric wires and cables in the case of SIV Industries v.CCE, Coimbatore [1998 (102) E.L.T. 60] and in respect of material handling equipment (oil tanks in the case of Nova Udyog reported in 1997 (92) E.L.T. 229. He submits that since the Tribunal had already come to a conclusion, that a decision of law arises, therefore, the reference application may be allowed.

9. Shri J.P. Kaushik, Id. Counsel submits that a reference only on wires and cables and not electric items was covered by the decisions of Tribunal in the case of SIV Industries cited above. He submits that in so far as the oil tanks are concerned, they are only part of the material handling equipment and though reference in the case of Nova Udyog Ltd. cited above has been made in respect of material handling equipment and thus there is distinction between the two. He therefore, submits that in case of oil tanks, no reference has so far been made or allowed by the Tribunal.

10. We have heard the rival submissions on the issue. We note that a reference in respect of wires and cables has already been made holding that a point of law arises. We also note that the Tribunal had concluded in the case of Nova Udyog that a point of law arises in respect of material handling equipment as capital goods under Rule 57Q. Having regard to the fact that a decision has already been taken by the Tribunal that a point of law arises, we do not see any reason to disagree with that conclusion of the Tribunal. In the instant case point of law reformulated as above may be referred to the Hon'ble Madhya Pradesh High Court at Jabalpur to settle the law in issue.

11. In the instant case M/s. Bansali Engineering Polymers took modvat credit on electric wires and cables and oil tanks. The Department alleged that wires and cables and oil tanks used as material handling equipment were not capital goods covered by the explanation under Rule 57Q during the relevant period and

therefore they denied them modvat credit. When the matter came up before the Tribunal, the Tribunal held that the denial of Modvat credit was wrong. By following the decisions of the Tribunal in the earlier cases, the Tribunal had taken a consistent view on the admissibility of Modvat credit on wires and cables and material handling equipment. This consistent view culminated in the decision of the Larger Bench of the Tribunal in the case of Jawahar Mills reported in 1999 (108) E.L.T. 47 = 1999 (32) RLT 379.

This issue is not clear inasmuch as the Government of India issued Notifications subsequently first on 14-6-95 and second notification on 26-3-96 specifically mentioning some of these items in these notifications. Therefore the Hon'ble MP High Court is requested to provide its considered view on the subject.

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