

Commissioner of C. Ex. Vs. Avis Electronics Pvt. Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Feb-21-2000

Reported in : (2000)(69)ECC272

Appellant : Commissioner of C. Ex.

Respondent : Avis Electronics Pvt. Ltd.

Judgement :

1. These appeals have come before a larger Bench on a reference made by a single Member of this Tribunal. Issue referred is clear from the order of reference. It reads :- "The issue involved in all the cases is common and that is whether the original copy of the invoice issued under Rule 52A could be called to be an enabling document for taking Modvat credit in terms of Rule 57G." "A number of judgments was cited before me. Two judgments given by the same Bench directly deal with this issue but give seemingly different ratio. In the case of Mahavir Spinning Mills Ltd. v. Commissioner of Central Excise, Chandigarh, reported in 1998 (98) E.L.T. 164 (Tribunal), it was held that even prior to the amended Rule 57G by way of Notification No. 23/94-C.E. (N.T.), credit could be taken on the basis of original copy of the invoice. The ratio of the same Bench in the case of Nestle India Ltd. v. Collector of Central Excise, Chandigarh, reported in 1998 (99) E.L.T. 443 (Tribunal) is that no credit could be taken on the original copy of the invoice. This issue has been also handled by a number of single Members. It is, therefore, necessary that this issue could be settled by a Larger Bench. It may be necessary to examine whether the requirement of production of a particular copy

of the invoice is merely procedural or whether it is mandatory in nature." 2. All these appeals are at the instance of the Revenue. Different show cause notices were issued to different parties for reversing the Modvat credit availed by them on the ground that they took Modvat credit without support of the duplicate copy of the invoice under which they got the inputs. Manufacturers to whom these show cause notices were issued submitted their explanations. Adjudicating authority, namely, the Assistant Collector, disallowed the credit. Those who availed of the credit were directed to deposit the amount. Penalty was also imposed on the assesseees under Rule 173Q(1)(bb) of the Central Excise Rules, 1944 as well. The seven assesseees against whom the jurisdictional adjudicating authority passed orders-in-original in the terms stated above went in appeal before the Commissioner (Appeals).

Appellate authority disposed of all the appeals by a common order.

According to that authority, since there was no dispute about payment of duty on inputs used in the manufacture of dutiable products, the denial of Modvat credit was purely on a procedural basis that duplicate copy of the invoice has not been produced. In this view, it was held that the Assistant Collector should have accepted the original copy of the invoice when there was no dispute about the payment of duty on the inputs. This stand taken by the appellate authority is under challenge.

3. The facts in Mahavir Spinning Mills, 1998 (98) E.L.T. 164 were that the manufacturer took Modvat credit on original copy of the invoices even though Notification No. 23/94-CE (N.T.) dated 20-5-1994 came into force and the departmental authorities by Order-in-Original and order-in-appeal reversed the credit. This Tribunal quashed the orders of the authorities below relying on other decisions observing : "We find that the tribunal has taken the consistent view in these three cases that since the receipt of the goods is also not in dispute and since the endorsed invoice is a duty paying document and since Notification No. 23/94-CE(NT) was issued within a short span from the date of introduction of the new scheme with effect from 1-4-94, held that Modvat credit on original invoice will be available." This was so done after distinguishing the decision rendered by

Madras High Court in *Medopharma v. Superintendent of Central Excise*, [1994 (70) E.L.T. 505] wherein it was held that the requirement of the notification is mandatory. In the case of *Nestle India Ltd.*, 1998 (99) E.L.T. 443, the same bench upheld the orders of the departmental authorities reversing the Modvat credit availed of on original copy of the invoice observing : "Where Rule 52A lays down a procedure for issuing the invoice or where it provides for issuance of different types of invoices or different copies of invoices under Rule 52A will come within the meaning and scope of 'invoice' mentioned in the proviso to Rule 57G(2). As a result, we do not find any legal infirmity in the impugned order disallowing Modvat credit availed of by the appellants on the basis of original copies of invoice." The conflicting views expressed by the same bench of this Tribunal have necessitated this reference to Larger Bench.

4. It is conceded before us by the learned Departmental Representative representing the Revenue and the learned counsel appearing on behalf of the respondents that the period concerned in these appeals is that subsequent to 20-5-1994 on which date Notification No. 23/94 was issued bringing into force Clause (2A) to Rule 57G of the Central Excise Rules, 1994.

5. As far as the issue raised in these appeals is concerned, Central Excise Rules which are relevant to be dealt with are Rules 52A(3), 57G(2) and 57G(2A). Rule 52A states that goods are to be supplied on an invoice. According to Clause (2) of that Rule, invoice should be in quadruplicate. Clause (3) provides as to how the various copies of the invoice are to be dealt with. The original copy of the invoice should be marked as "original for buyer". Duplicate copy should be marked as "duplicate for transporter." By Notification No. 23/94 dated 20-5-1994, it was provided that this duplicate copy is the one to be used for taking credit under Rule 57G and Rule 57T. The third Sub-clause of Clause (3) states that the triplicate copy of the invoice should be marked as "triplicate for Central Excise". Lastly, it provides that the quadruplicate copy shall be marked as "quadruplicate for the assessee".

Here the assessee is the person who issues the invoice. Procedure to be observed by the manufacturer who wants to avail Modvat credit is provided by

Rule 57G. The manufacturer who intends to take credit of the duty paid on inputs should file a declaration with the Assistant Commissioner having jurisdiction over his factory indicating the inputs intended to be used in the final product. Such a manufacturer who has filed a declaration is allowed to take credit of the duty paid on the inputs received by him as per Clause (2) of the Rule. First proviso to Clause (2) states that no credit shall be taken unless the inputs are received in his factory under the cover of an invoice issued under Rule 52A, an AR-1, or Bill of Entry or any other document as may be prescribed by the Central Government by notification in the Official Gazette in this behalf evidencing payment of duty on such inputs. When Rule 52A(3) is read along with this proviso, it is abundantly clear that the manufacturer who wants to take credit of the duty paid on inputs must do it on the basis of the duplicate copy of the invoice in case the document evidencing payment of duty on inputs is an invoice.

Insistence on the duplicate copy of the invoice is further amplified by the provision contained in Clause (2A) of Rule 57G. This clause is in the following terms :- "Notwithstanding anything contained in Sub-Rule (2) a manufacturer can take credit of the inputs received in the factory on the basis of the original invoice, if the duplicate copy of invoice has been lost in transit, subject to the satisfaction of the Assistant Collector." This provision contains a non obstante clause. On account of this non obstante clause, it can safely be held that the Rule mandates the production of the duplicate copy of the invoice for taking credit of the duty paid on inputs in spite of apparent alternatives provided in Sub-Rule (2) of the Rule. That mandate is to some extent relaxed by clause (2A) itself. As per the relaxed provision, the manufacturer can take credit of the duty paid on inputs on the basis of the original invoice if he satisfies the Assistant Collector that the duplicate copy of the invoice has been lost in transit. In other words, the manufacturer can take credit of the duty paid on inputs only on the basis of the duplicate copy of the invoice and where the duplicate copy of the invoice has been lost in transit, he can take credit of the duty paid on the inputs on the basis of the original invoice provided he satisfies the Assistant Collector about the loss of the duplicate copy.

6. Learned D.R. representing the Revenue submitted that a manufacturer can take credit of the duty paid on inputs on the basis of the original invoice only if he

satisfies the jurisdictional Assistant Collector the factum of loss of the duplicate copy of the invoice in transit.

According to him, the loss of the invoice should have happened in the course of the transit of the goods; namely while the invoice was in the possession of the driver of the vehicle in which the inputs were brought to the manufacturer's premises. We are not in a position to agree with this submission. If this argument is to be accepted we will have to read some more words into the rule. Relevant words used in Clause (2A) of Rule 57G are "if the duplicate copy of invoice has been lost in transit." To give effect to the submission made by the learned D.R. the above provision should be read as "if the duplicate copy of the invoice has been lost in transit of the inputs to the premises of the manufacturer." Understanding the provision contained in the Rules, this Tribunal is not to supplement or add words to the Rules. The Rule, as it stands, states that the duplicate copy of the invoice must have been lost in transit. What is the true scope of the word "transit"? Invoice is prepared by the person who sends the input. A manufacturer who wants to take credit of the duty paid on such inputs must produce the invoice before the jurisdictional officer to get it defaced. So, the transit of the duplicate copy of the invoice is from the person who sold the inputs to the office of the concerned excise officer. In the course of this transit, if the duplicate copy of the invoice is lost, manufacturer should establish the same to the satisfaction of the concerned Assistant Collector. On the Assistant Collector's satisfaction re-' regarding the loss of the duplicate copy in transit, the manufacturer can take credit of the duty paid on inputs received in the factory on the basis of the original invoice. Only on such a condition the original invoice can be of assistance to the manufacturer enabling him to take credit of the duty paid on the inputs. This is the legal position. Contrary view expressed in the case of Mahavir Spinning Mills, 1998 (98) E.L.T. 164 is not the correct legal position.

7. Learned counsel representing the manufacturers, respondents in this case, submitted that as per the existing provisions contained in the Rules, Modvat credit can be claimed only within a period of six months.

In cases where duplicate copies are lost and concerned Assistant Collector is moved for getting sanction to use the original invoice for availing Modvat credit, that officer can successfully deny the benefit to the manufacturer by delaying orders on the application. Since Modvat credit can be claimed within six months and if the concerned Asstt.

Collector is not passing the order on the submission regarding loss of the duplicate within that period, the manufacturer should not be put to difficulty. If such a situation arises, according to us, the manufacturer can take the credit within six months but should not avail it of before the concerned Asstt. Collector passes order on the issue relating to loss of the duplicate copy in transit. This will safeguard the interest of the manufacturer as well as the Revenue.

8. In the light of the above finding arrived at by us on the question referred to us, we hold that insistence on document evidencing payment of duty on the inputs as prescribed by Rules is not a technicality to be complied with for availing Modvat credit. Observation made by the appellate authority that insistence on duplicate copy of invoice is purely a procedural requirement is against Rules so cannot be sustained. When a particular thing is directed to be performed in a manner prescribed by Rules, it should be performed in that manner itself and not otherwise. A combined reading of the provisions contained in the Rules makes it clear that a manufacturer who wants to take credit of the duty paid on inputs must base his claim on the duplicate copy of the invoice. In case the duplicate copy has been lost in transit, he can take credit on the basis of the original. This can be done only if he satisfies the concerned Asstt. Collector about the loss of the duplicate copy in transit.

9. On the basis of the above answer given on the question referred to us, we shall dispose of these appeals.

10. In appeal E/410/98-NB, manufacturer requested that they be allowed to take credit on the basis of the original copy of the invoice on the ground that the duplicate was lost. This claim was negated on the ground that if the duplicate was lost during transportation, immediate intimation should be given and that no affidavit of the transporter was filed. As stated earlier, this stand of the

jurisdictional Asstt.

Collector is not warranted by law. Since the manufacturer has informed of the loss of the duplicate copy and stated that he is availing the credit on the basis of original invoice, his claim cannot be denied on the basis that the loss was not in the course of the transportation of the inputs. Consequently, the appellate authority was justified in reversing the finding arrived at by the adjudicating authority. We do not find any ground to interfere with the order-in-appeal at the instance of the Revenue.

11. In appeal E/411/98-NB, manufacturer availed Modvat credit on the basis of a photo copy of the original invoice. It is surprising to note that the Modvat credit was taken not on the basis of the duplicate copy or on the original copy of the invoice but on a photo copy of the original invoice. Since the concerned Asstt. Collector was not moved for sanction to avail Modvat credit based on original invoice on the ground of the loss of duplicate copy of the invoice, the manufacturer could not take credit on the original invoice even. In such a situation, he was not authorised to avail the credit on the basis of a photo copy. This is clearly impermissible. So, the order passed by the Commissioner (Appeals) on this issue is erroneous.

12. Learned counsel appearing for the respondent in this case raised a contention that the claim put forth in the show cause notice was barred by limitation. According to him, the show cause notice should have been issued within six months reckoned from the date of filing the monthly RT-12 returns. This having not been done, it was contended that the adjudicating officer was not justified in passing any order pursuant to the show cause notice. Authorities below did not address themselves to this issue. This issue requires further scrutiny of facts. Therefore, we remit the issue to the adjudicating officer for de novo decision.

Thus, appeal E/411/98-NB is allowed by way of remand to the adjudicating authority to consider the question of limitation only.

Since the matter is an old one, adjudicating officer should pass final order within three months from the date of receipt of a copy of this order. We make it clear that the manufacturer should be given a reasonable opportunity of being heard in the

matter before passing final order.

13. In appeal E/412/98-NB, manufacturer availed Modvat credit without producing the duplicate copy of the invoice. They did not seek permission of the concerned Asstt. Collector to claim Modvat credit on the basis of the original invoice on the ground that duplicate copy was lost in transit.

The stand taken by the manufacturer was that omission to submit duplicate copy of the invoice was a technical lapse. This contention cannot stand in view of the findings arrived at by us herein before.

Therefore, the appeal of the Revenue is allowed. Order-in-appeal passed by the Appellate Commissioner is reversed and that of the adjudicating authority restored.

14. In appeal E/413/98-NB, manufacturer took credit on the basis of the original copy of invoice. It was contended before the adjudicating authority that duplicate copy of the invoice was retained by the sales-tax authorities. At no point of time could the manufacturer produce any document before the adjudicating authority showing that the duplicate invoice in the possession of the sales-tax authorities. His contention was that he was justified in taking credit on the basis of the original invoice and non-production of the duplicate copy was a technical lapse. Even at the time of arguments of this appeal learned counsel representing the manufacturer was not in a position to state before us as to what happened to the duplicate copy. Manufacturer has no case that he approached the concerned Asstt. Collector for sanction to take credit on the basis of the original invoice on the plea that the duplicate was lost. In such a situation, we allow the appeal, set aside the order passed by the Appellate Commissioner and restore the order of the Assistant Collector, the adjudicating authority.

15. In appeal E/414/98-NB, manufacturer claimed credit on the basis of original copy of the invoice on the ground that non-production of duplicate copy of the invoice is only a technical offence. Since manufacturer had no case that the duplicate copy of the invoice was lost in transit and that he sought the sanction from the concerned Asstt. Collector to avail credit on the basis of the original

invoice, we do not find any ground to interfere with the order passed by the jurisdictional adjudicating authority. Consequently, order passed by the Commissioner (Appeals) is set aside and the order of the adjudicating authority restored.

16. In appeal E/415/98-NB, manufacturer availed Modvat credit on the basis of the original invoice. Before claiming credit he had not sought sanction from the concerned Asstt. Collector to claim credit on the basis of the original invoice on the ground that duplicate copy of the invoice was lost in transit. Therefore, we allow the appeal, set aside the order passed by the Commissioner (Appeals) and restore that passed by the adjudicating authority.

17. In appeal E/468/98-NB, the manufacturer availed of Modvat credit on the basis of original invoice stating that the duplicate copy was lost/misplaced. He did not seek permission of the concerned Assistant Collector to avail credit on the basis of the original invoice on the ground that the duplicate copy was lost in transit. His stand was that production of the duplicate copy of the invoice was only a formality or technicality. This stand cannot be supported. Therefore, we allow the appeal, set aside the order of the Commissioner (Appeals) and restore that passed by the adjudicating authority. Ordered as above.

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