

Commissioner of Central Excise Vs. Modi Cements Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Apr-28-2000

Reported in : (2000)(71)ECC260

Appellant : Commissioner of Central Excise

Respondent : Modi Cements Ltd.

Judgement :

1. This is a Reference Application filed by the Commissioner of Central Excise, Raipur against the Tribunal's Final Order No. A/1066/97-NB(DB) dt. 4-11-1997. In Para 8 of the Reference Application, the applicant Commissioner has formulated three questions as under: (i) Whether Modvat credit taken by M/s. Modi Cement Limited in their RG-3A Part-II in August 1993 in respect of HDPE woven Bags/sacks received by them during October 1987 to October 1998 finally assessed to duty under Heading 6301.00 of Central Excise Tariff and had paid duty accordingly at the manufacturers end (factory of origin) would be correct, legal and proper. Specially when there is neither a revision in the classification nor a variation in the rate of duty/duty paid at the factory origin, and pre-requisites of Rule 57E of the Central Excise Rules was not complied with.

(ii) Whether in regard to the facts and circumstances of the case it is proper, correct and legal to hold that the Modvat credit taken after a lapse ranging from 2 years and 9 months to 5 years and 9 months from the date of receipt of the HDPE Bags (Heading 6301.00) in the factory and in respect of which no quantity and duty credit was taken in RG-23A Part I and II at the time of receipt of the said

goods could be considered as reasonable for availment of Modvat when no limitation of time was prescribed under Rule 57G of the Central Excise Rules prior to insertion of 2nd proviso to Rule 57G(2) by Notification No. 28/95-CE(NT) dated 29-6-1995, prescribing limitation of six months from the date of issue of the duty paying documents for availment of input duty credit under Rule 57G of the Central Excise Rules.

(iii) Whether HDPE Bags classified under Heading 3922.90 and 6301.00 of the Central Excise Tariff would constitute separate class of goods as they have been classified under different Tariff Heading, and whether the Party's non-declaring HDPE Bags classified under Heading 6301.00 of the Central Excise Tariff in any of their Modvat declarations during the period October, 1987 to October, 1990 would result in non-compliance of the substantive requirement of filing a declaration declaring the description of the 'inputs' and the Tariff Heading in terms of Rule 57G of the Central Excise Rules or not especially in the context of Collector, Central Excise, Indore's Trade Notice No. 39/86 dated 28-7-1986 making it obligatory on the part of the assessee intending to avail input duty credit (Modvat credit) under Rule 57A of the Central Excise Tariff to file a declaration under Rule 57G of the Central Excise Rules." 2. In the Final Order, the Tribunal had, relying on its earlier decision in Collector of Central Excise, Bhubaneswar v. Orissa Cement Ltd. 1993 (47) ECR 123 held that HDPE bags/sacks classifiable under Chapter sub-heading 3923.90 was eligible for modvat credit when used as inputs and held that the assessee's claim for modvat credit for HDPE bags as packing material for cement were eligible inputs under Rule 57A of the Central Excise Rules during the relevant period. The Tribunal had observed that it was not in dispute that the appellants had taken credit on HDPE bags in their RG. 23A Part-II on 30-8-1993 and had intimated it to the Department as per RT-12 Returns for the month of August, 1993 though the credit of differential duty was taken by the appellants at a much later date, after a lapse of between 33 and 69 months from the date of receipt of goods. The Asst. Collector had denied them the credit on the ground that the credit had been taken beyond the reasonable period of six months. The Tribunal in the impugned order had however, taken the view that what would be reasonable period would depend on the facts of each case and had relied on the Apex Court judgement in Government of India v. Citadal Fine Pharmaceuticals

1989 (42) E.L.T. 515 (S.C) holding that what would be reasonable time would depend on the facts of each case. The Tribunal had further observed that in the facts of the case, the assessee had taken credit within six months of the first publication of the decision of the Tribunal in Orissa Cement case and therefore even adopting the yardstick of six months as reasonable period, their claim for modvat credit would be admissible.

3. Arguing the Reference Application, Id. JDR, Shri M.M. Dube contended that credit on Central Excise duty could be availed of under Rule 57A only on specified inputs used in relation to the manufacture of specified finished products. In the case of the Respondents herein, the goods falling under Chapter 63 of the Central Excise Tariff Act did not come within the eligible inputs under Notification No. 177/86 dt.

1-3-1986 as amended from time to time. In the case of the Respondents herein, HDPE woven bags/sacks were classified under Heading 63.01 and were assessed to duty at the factory of origin. The duty was not paid under protest. The consignees, namely M/s. Modi Cement Ltd., the Respondents therein, could not therefore avail the modvat credit on such HDPE bags in August, 1993. Therefore, no reliance could have been placed on the decision in Orissa Cement case classifying HDPE bags under Chapter Heading 3923.00 even by adopting the ratio of the Apex Court ruling in Citadal Fine Pharmaceuticals case. Therefore, Id. JDR submitted that the questions of law as formulated in the Reference Application had arisen which may be referred to the Hon'ble Madhya Pradesh High Court.

4. Shri A.K. Jain, Id. Advocate for the Respondents who opposed the Reference Application submitted that the Tribunal had correctly relied on the Orissa Cement case for holding that the Respondents were eligible for taking modvat credit on HDPE bags during the relevant period. He also contended that the Apex Court in Citadal Fine Pharmaceuticals case had clearly held that what would be reasonable time will have to be considered in the facts of each case where no such time frame has been specified in the statute. He therefore prayed for rejecting the Reference Application.

5. On consideration of the submissions made before us and the Reference Application filed by the Department, we are of the view that to the extent the Tribunal has allowed taking of modvat credit in 1993 in relation to declarations filed during the period between October 1987 and October 1990, a question of law as to what would be the reasonable period for taking credit has arisen in the facts and circumstances of the case.

6. Accordingly, we allow the Reference Application to the limited extent and the following statement of the case is formulated and referred to the Hon'ble High Court of M.P. at Jabalpur under Section 35G of the Central Excise Act, 1944.

M/s. Modi Cement Ltd., Raipur are engaged in the manufacture of cement under Chapter 25 of the Central Excise Tariff Act 1985. During the period October 1987 to October 1990, they had received HDPE woven sacks/bags for packing cement. The Gate Passes received of the goods showed the items as classified under Chapter Heading 6301.00 of the Central Excise Tariff Act. M/s. Modi Cement Ltd. did not avail the quantity of credit on HDPE woven sacks at the relevant time.

Subsequently in August 1993 they made a note in their RG. 23A Part. I and took credit for HDPE bags for the period October 1987 to October 1990. In terms of Rule 57G every manufacturer intending to take credit of duty paid under Rule 57A has to file a declaration indicating the description of the final products and the inputs intended for use in each of the final products and such other information as the Asst.

Collector may require and obtain a dated acknowledgement on the declaration. In the modvat declaration filed by the Respondents herein on 28-3-1987 HDPE bags were declared under Heading 3922.90. However, they did not show the receipt of the goods in Part I of RG. 23A at the time of their actual receipt nor were monthly Modvat returns furnished in terms of Rule 57G. It was only in August 1993 that they submitted a consolidated single entry giving all the relevant details for taking credit. The credit was taken after a lapse of between 33 and 69 months from the date of receipt of inputs. The Asst. Commissioner therefore disallowed the taking of credit as being beyond reasonable time. The said matter was adjudicated after issuing a SCN by the Collector, Central Excise, Raipur who disallowed the Modvat

credit of Rs. 52,69,085.12 on HDPE bags on the ground that HDPE bags were not specified as inputs for the manufacture of cement.

The Respondents herein thereafter preferred an appeal before the Tribunal. The Tribunal disposed of the matter by its Final Order No.A/1066/97-NB(DB), dated 4-11-1997 holding that Modvat credit will be admissible to the appellants having regard to the earlier decision of the Tribunal in the case of CCE v. Orissa Cement Ltd. 1994 (68) E.L.T.537 in which it was held that Modvat credit for HDPE bags used as packing material for cement would be eligible as input under Rule 57A during the relevant period. The Tribunal also construed the period for taking Modvat credit in the instant case as reasonable in the light of the Apex Court judgment in Government of India v. Citadal Fine Pharmaceuticals 1989 (42) E.L.T. 515 (S.C.) wherein the Apex Court held that reasonable period has to be construed in the facts of each case.

After considering the Reference Application filed by the Department and the submissions made by both the sides, we are of the view that the following question of law has arisen from the Final Order referred to above viz., "whether in the facts and circumstances of the case, it was legally correct for the Tribunal to allow taking of Modvat credit by the Respondents herein after a lapse of between 33 and 69 months from the date of receipt of the inputs, in the absence of any reasonable period having been specified under the Rules for taking of Modvat credit".

The above statement of facts and point of law are hereby submitted to the Hon'ble High Court of M.P. at Jabalpur for its consideration and determination under Section 35G of the Central Excise Act, 1944.

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