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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jun-09-2000

Reported in : (2000)(71)ECC252

Appellant : Crown Industries

Respondent : Collector of Central Excise

Judgement :

1. These appeals are before this Larger Bench upon reference by other Benches of the Tribunal.

2. The issue involved in all these appeals is the scope of Rule 57H which relates to 'transitional provisions' relating to modvat credit.

This Rule has existed from March 1986 (though subject to various amendments) when modvat credit was introduced. Rule 57A confers benefit of credit of duty paid on excisable goods used as inputs. Rule 57G lays down "procedure to be observed by the manufacturer". Sub-rule (1) of that Rule stipulates that "every manufacturer intending to take credit of the duty paid on inputs under Rule 57A or Rule 57B shall file a declaration with the Assistant Commissioner of Central Excise having jurisdiction over his factory, indicating the description of the final products manufactured in his factory and the inputs intended to be used in the said final products and such other information as the said Assistant Commissioner may require, and obtain a dated acknowledgement of the said declaration". Sub-rule (2) of the same Rule stipulates that "a manufacturer who has filed a declaration under

Sub-rule (1) may, after obtaining the acknowledgement aforesaid, take credit of the duty on the inputs received by him". Thus, it is a requirement under this Rule that manufacturers intending to take credit of duty paid on inputs shall file declaration before the jurisdictional Assistant Commissioner of Central Excise and obtain dated acknowledgement and after obtaining the acknowledgement, they may take credit of duty paid on inputs. Rule 57H which deals with 'transitional provisions' contains exception to Rule 57G. It stipulates that Assistant Commissioner of Central Excise may allow credit of duty paid on inputs received by a manufacturer immediately before obtaining the dated acknowledgement of the declaration made under the said rule subject to the Assistant Commissioner's satisfaction of conditions stipulated in that Rule. The dispute in the present appeals relates to claims of assessees for Modvat credit under Rule 57H on stocks of inputs held by them during transition from exemption to duty payment on final products. The claim of M/s Bhanu Chemicals is in respect of inputs held by them on 11-6-1990, of M/s Crown Industries in respect of stock held by them on 26-6-1989 and of M/s Zoloto Industries in respect of stock held by them on 2-5-1989. The dispute has arisen on account of amendment of Rule 57H with effect from 5-5-1989. Sub-rule (1) of Rule 57H read as under prior to its amendment on 5-5-1989 :- "(1) Notwithstanding anything contained in rule 57G, the Assistant Collector of Central Excise may allow credit of the duty paid on inputs received by a manufacturer immediately before obtaining the dated acknowledgement of the declaration made under the said rule if he is satisfied that - (i) such inputs are lying in stock or are received in the factory after filing the declaration made under Rule 57G, or (ii) such inputs are used in the manufacture of final products which are cleared from the factory on or after the 1st day of March, 1987." 3. Clause (ii) of Sub-rule (1) was omitted by Notification No. 20/89 dated 5-5-1989.

Subsequently, vide notification No. 28/91, dated 25-7-1991, Rule 57H was again amended to restore the effect of Clause (ii) of Sub-rule (1).

Thus, the issue involved in the case of Zoloto Industries has to be decided in terms of Rule 57H as it existed prior to the amendment on 5-5-1989 i.e. when Clause (ii) of Rule 57H(1) was in existence, and in the other two cases, the rule as it existed after the deletion of Clause (ii) of Sub-rule (1) of Rule 57H.4. The dispute

is in respect of eligibility of inputs which were not in stock as such i.e. they had been subjected to processing or had already become part of the finished final product before the credit was allowed by the Assistant Collector. The Revenue has been holding that under amended (w.e.f. 5-5-1989) Sub-rule (1), credit is permissible only in respect of inputs in stock as such and that credit is not permissible in respect of inputs which have become part of the final product in view of the deletion of Sub-rule (ii). Further, they have taken the position in M/s Zoloto Industries case that since under Clause (ii), the eligibility will depend upon use of such inputs in the manufacture of final products which are cleared from the factory before that clause was deleted with effect from 5-5-1989, the inputs which went into the manufacture of final products which were cleared from 5-5-1989 were also not eligible for Modvat credit.

5. The reason for making the reference to this Larger Bench is that the Tribunal had taken different views on the subject. In Konark Cement & Asbestos Ltd. v. CCE, Bhubaneshwar 1994 (69) E.L.T. 669 (Tribunal), a Division Bench of the East Regional Bench took the following view :- "7. We accept the contention of the learned Senior Departmental Representative that Sub-rule (1) of Rule 57 as it existed after 5-5-1989 sans the protecting Sub-clause (ii) thereunder cannot be given effect to, as if the latter provision existed thereafter also.

While deleting the said provision apparently on the ground that it was no longer necessary to lay down the condition of clearance on or after 1-3-1987, the vital coverage of inputs not in stock as such but used in the manufacture of final products cleared after a crucial date had also been deleted. The effect is that after the said amendment deleting Sub-clause (ii) transitional credit can be given only in terms of the retained Sub-clause (i) which is restricted to inputs lying in stock. It is not possible to agree with the contention raised by the appellants that even after the said deletion the retained provision, namely, inputs lying in stock will cover inputs lying in stock as such as well as the inputs present in the converted form and available as final product. That will mean supplying such words to the provision and that too the deleted words. The said deleted provision was reintroduced with effect from 25-7-1991 when the benefit of Modvat credit was reintroduced in respect of aerated waters. If, as contended, the words "inputs in

stock" covered inputs present as final products also then there was no necessity to reintroduce the deleted provision viz. Sub-clause (ii). This is a deliberate reintroduction of the relevant entry with a view to take care of the need to provide Modvat benefit in respect of inputs contained in the final products and not present as such. The plain reading of the expression "inputs in stock" would cover only inputs present as such. Once they are taken into use and get converted into other material they cannot be said to be in stock. The order of the Assistant Collector has proceeded on a correct appreciation of the facts and the legal position and has been correctly sustained. We accordingly uphold the same and reject the Appeal." This view was also followed by a Single Member Bench of the Tribunal in CCE, Calcutta-11 v. Okay Steel Private Ltd. 1994 (73) E.L.T. 694 (Tribunal). However, when the same issue came up later in the case of Suresafe Glass Works (P) Ltd. v. CCE, Calcutta-I 1996 (83) E.L.T. 328 (Tribunal), the Single Member took a view that even after the deletion of Clause (ii), the surviving Clause (i) would still cover 'inputs in process'. Paragraph 7 of the judgment states as under :- "7.1 shall now examine the said provision. After the said amendment of Rule 57H(1) with effect from 5-5-1989, the said Rule read as follows :- "Notwithstanding anything contained in Rule 57G, the Assistant Collector of Central Excise may allow credit of the duty paid on inputs received by a manufacturer immediately before obtaining the dated acknowledgement of the declaration made under the said Rule if he is satisfied that such inputs are lying in stock or are received in the factory on or after the 1st day of March 1987." The plea that even after the deletion of Sub-clause (ii) the surviving clause viz. Clause (1) would still cover inputs used in the manufacture of final products which are cleared from the factory on or after 1-3-1987 does not appear to be tenable and, in fact, had been held to be so vide the Tribunal decision in Konark Cement & Asbestos Ltd. v. Collector of Central Excise, Bhubaneswar to which I was a party. It was held therein that the expression "inputs in stock" in the amended Rule 57H(1)(i) as it existed after 5-5-1989 would cover only inputs present as such and that once they are taken into use and converted into other material they cannot be said to be inputs in stock. That case was reported in 1994 (69) E.L.T. 669.

That decision was followed by me in another case, Collector of Central Excise v. Okay Steel (P) Limited reported in 1994 (73) E.L.T. 694. After carefully going

through these decisions in the light of the arguments now advanced before me in the present case I find that in the aforesaid two cases, the argument was mainly on the deleted Sub-clause (ii) and that such deletion would have no effect on clearances made in and after May, 1989 which were in any case, after the cut off date 1-3-1987 contained in the said deleted provision. The arguments advanced and considered in the aforesaid two cases did not take adequate note of Sub-clause (i) of Rule 57H(1) as it stood after the 5-5-1989 amendment. The said Sub-rule as it stood at the material time has been extracted earlier. It covered inputs received by a manufacturer immediately before obtaining the dated acknowledgement of the declaration made under Rule 57G if such inputs are lying in stock or are received in the factory on or after 1-3-1987. The second alternative position of receipt of inputs on or after 1-3-1987 had not received necessary attention in the earlier two cases referred to above nor, for that matter, in the present cases before me. The impugned orders have also been passed entirely on the footing that Sub-clause (ii) did not exist at that time and did not cover goods contained in the final products cleared on or after 1-3-1987. The benefit was extended only to the inputs lying in stock as such. As there was no finding in the above cited earlier decisions in Konark Cements & Asbestos Ltd. and Okay Steel (P) Limited cases from the stand point of inputs received in the factory on or after 1-3-1987 and which point now is to be disposed of in view of the submission made that Rule 57H(1)(i), after the amendment in question covered their inputs, I have to consider the same on merits unshackled by the two earlier decisions as they had been passed sub silentio. As per the discussions in Salmond on jurisprudence followed in the Tribunal decision in Collector of Central Excise, Rajkjot v. Surgichem reported in 1987 (27) E.L.T. 548 a decision without argument and without reference to the crucial words of the rule would not be binding and such a precedent sub silentio is not authoritative.

Applying the above criterion to the two decisions in question, I find that the same were decided without reference to the provision regarding receipt of the inputs in the factory on or after 1-3-1987.

If the inputs in question satisfied this test, they would be covered by Rule 57H(1)(i) and Modvat Credit would be admissible for such inputs. The appeal succeeds on

this question, subject to verification of the factual position by the Assistant Collector." The reference order in M/s Bhanu Chemicals also refers to the decisions of the Tribunal in favour of the assessee in the case of Collector of C. Ex., Ahmedabad v. Navdeep Packing Industries 1994 (69) E.L.T. 358 (Tribunal) and Collector of Central Excise, Madras v. Kothari Industrial Corpn. Ltd. 1995 (61) ECR 621 (Tribunal), even though these decisions were rendered either subsequent to restoration of Clause (ii) or prior to amendment dated 5-5-1989.

6. When the cases were taken up for argument, the appellants did not appear for arguing. Instead, they filed written submissions. We have, therefore, heard the Ld. DR and Shri R. Swaminathan who appeared as intervener.

7. In the case of Zoloto Industries, the claim for Modvat credit was in respect of stocks of inputs available as on 2-5-1989 i.e. prior to deletion of Clause (ii). Therefore, during the period, both the clauses were present in the rule and as a result, there is no dispute that credit was permissible both on inputs in stock as well as inputs in process or which had been used in the manufacture of finished products.

Since the claim pertained to the stock prior to the amendment dated 5-5-1989, the Commissioner (Appeals) allowed the appellants' claim on the ground that amendment with effect from 5-5-1989 cannot have retrospective effect and the amending notification is applicable only prospectively. This is settled legal position and the Commissioner was relying on the decision of the High Court in Universal Drinks Private Ltd., Nagpur v. Union of India and Anr. 1984 (18) E.L.T. 207 (Bom.).

Therefore, the decision of the Commissioner (Appeals), Chandigarh in the case of Zoloto Industries suffers from no error or illegality.

Therefore, we hold that the appeal filed by the Revenue against that order has no merit and accordingly, reject the same.

8. The appeals of M/s Bhanu Chemicals and M/s Crown Industries relate to the period subsequent to deletion of Clause (ii) with effect from 5-5-1989 and is prior to its restoration with effect from 25-7-1991. We have already reproduced earlier in

this order the two conflicting views expressed in the case of Konark Cement & Asbestos Ltd. and Suresafe Glass Works (P) Ltd. The view held in Konark Cement & Asbestos Ltd. was that "the effect is that after the said amendment deleting Sub-clause (ii) transitional credit can be given only in terms of the retained Sub-clause (i) which is restricted to inputs lying in stock" (emphasis added). The reason given for the subsequent change of view by the Member in Suresafe Glass Works is that the decision in Konark Cement & Asbestos Ltd. case was rendered without taking into account the second part of the clause which related to 'inputs received in the factory on or after the first day of March 1987' (the correct version was received in the factory after filing the declaration made under Rule 57G) and since the decision had been thus taken sub silentio without reference to the crucial words of the rule and without argument, that decision cannot be treated as binding and authoritative. During hearing, it has been submitted by the Intervener that the undeleted Clause (i) covered both inputs in stock as well as inputs present in semi-finished and finished final products. It has been submitted that Sub-clause (ii) actually related to final products manufactured and cleared before the assessees came under Modvat credit (filing of declaration and obtaining dated acknowledgement as stipulated in Rule 57G). The deletion in 1989 of that provision was also on account of the reason that by 1989, the final products manufactured by the assessees prior to their coming under the Modvat scheme would have been a' cleared. Therefore, that clause would no more have been operative. The learned Counsel has also submitted that this position is clear from the fact that, that provision was restored to Rule 57H once new products were brought under Modvat scheme. Shri Swaminathan also referred to the decision of the Supreme Court in CCE, Shillong v. Wood Craft Products Ltd. 1995 (77) E.L.T. 23 (SC) wherein the Supreme Court has held that amendments to Chapter Note 5 with effect from 20-3-1990 and 1-3-1992 were only clarificatory and made explicit what was already implicit in the Heading throughout. He submitted that an amendment necessarily did not mean that the legal position has changed.

9. The learned DR submitted that the law as laid down by the Tribunal in Konark Cement & Asbestos Ltd. constituted the correct law. He referred in particular to the finding that inputs lying in stock will cover inputs lying in stock as such only and that if the expression 'inputs in stock' was intended to cover inputs contained in

final products also, then there was no necessity to re-introduce the deleted provision i.e. Sub-clause (ii). He also submitted that the Konark Cement & Asbestos Ltd. case which is a Division Bench decision should have been followed by the Single Member Bench in Suresafe Glass Works (P) Ltd. case. If the earlier order was found to be incorrect, the proper course would have been to refer the case to a Larger Bench than to render a contradictory decision.

10. The Single Member has explained in his order the reason for changing his decision in the subsequent case of Suresafe Glass Works.

He has also explained that the subsequent decision is not in violation of judicial discipline inasmuch as the original decision was rendered without considering specific words in the Rule. He has also referred to Salmond Jurisprudence on the subject and that the Tribunal has been following this view in its earlier decisions. We find that the Apex Court considered the issue relating to the correct procedure to be followed when differences arise between two Benches of the Tribunal in its judgment in the case of Union of India v. Paras Laminates (P) Ltd. reported in 1990 (49) E.L.T. 322 (SC) and observed as under :- "9. It is true that a Bench of two members must not lightly disregard the decision of another Bench of the same Tribunal on an identical question. This is particularly true when the earlier decision is rendered by a larger bench. The rationale of this rule is the need for continuity, certainty and predictability in the administration of justice. Persons affected by decisions of Tribunals or Courts have a right to expect that those exercising judicial functions will follow the reason or ground of the Judicial decision in the earlier cases on identical matters. Classification of particular goods adopted in earlier decisions must not be lightly disregarded in subsequent decisions, lest such judicial inconsistency should shake public confidence in the administration of justice. It is, however, equally true that it is vital to the administration of justice that those exercising judicial power must have the necessary freedom to doubt the correctness of an earlier decision if and when subsequent proceedings bring to light what is perceived by them as an erroneous decision in the earlier case. In such circumstances, it is but natural and reasonable and indeed efficacious that the case is referred to a Larger Bench. This is what Was done by the Bench of two members who in their reasoned order pointed out what they perceived to be an

error of law in the earlier decision and stated the points for the President to make a reference to a Larger Bench." It is clear from the above observations of the Supreme Court that the proper thing for the Single Bench to do would have been to refer the matter to a Larger Bench than to render a differing decision.

11. With regard to the merits of the case, we find that Rule 57H(1) after its amendment continued to relate to grant of transitional credit i.e. an assessee moving from not availing of Modvat credit to availing of Modvat credit. The rule, thus, relates to inputs already at hand.

This rule is an exception to the provisions in Rule 57G which relates to procedure for availing of Modvat credit. The rule opens with the non-obstante clause "notwithstanding anything contained in Rule 57G".

The Rule may be reproduced below :- "(1) Notwithstanding anything contained in rule 57G, the Assistant Collector of Central Excise may allow credit of the duty paid on inputs received by a manufacturer immediately before obtaining the dated acknowledgement of the declaration made under the said rule if he is satisfied that - (i) such inputs are lying in stock or are received in the factory after filing the declaration made under rule 57G, or" The Rule thus stipulates that Assistant Collector of Central Excise may allow credit of the duty paid on inputs received by a manufacturer immediately before obtaining the dated acknowledgement of the declaration made under the said Rule if he is satisfied about two conditions. The first is that "such inputs are lying in stock" and the second is that "the inputs are received in the factory after filing the declaration made under rule 57G". That these two conditions are separate and relate to different consignments of goods is clear from the use of the word "or" in the clause. The word "or" has been used disjunctively in the present case separating two alternatives. Therefore, the condition applicable to one clause would not apply to the other clause. Thus, the clause "such inputs are lying in stock or are received in the factory after filing the declaration made under rule 57G" relates to two separate types of consignments i.e. the first clause relates to stocks of inputs lying in stock i.e. are physically available as such and the second clause relates to inputs received in the factory after filing the declaration. The second clause contains no condition that the

consignments of inputs received in the factory after filing the declaration should be lying in stock. A perusal of the decision in Konark Cement & Asbestos Ltd. case makes it clear that that order was passed without examining the second clause '(are received in the factory after filing the declaration made under rule 57G)'. Since there was no requirement under Clause (i) that the inputs received after filing the declaration should be lying in stock, Modvat credit in respect of such inputs should be available even if they were not available as such but have been subjected to manufacturing process or used in or in relation to the manufacture of the final product Therefore, we are not able to agree with the finding in the Konark Cement & Asbestos Ltd. decision that "the effect is that after the said amendment deleting Sub-clause (ii) transitional credit can be given only in terms of the retained Sub-clause (i) which is restricted to inputs lying in stock".

12. In the light of what has been stated above, we are of the opinion that Rule 57H(1) during the period from 5-5-1989 to 25-7-1991 also permitted grant of Modvat credit in respect of both inputs lying in stock as well as inputs in process or used in relation to the manufacture of the final products provided such inputs had been received in the factory after the filing of the declaration made under Rule 57G. The reference is answered accordingly.

13. Coming to the appeals of M/s Crown Industries and M/s Bhanu Chemicals, we find that their entitlement to Modvat credit in respect of inputs in process and inputs contained in finished products has not been considered from the point of view whether those inputs were received in the factory after filing the declaration made under Rule 57G". They have been rejected only on the ground that the inputs were not in stock as such. Therefore, their claim is required to be reconsidered based on the factual position as to whether the inputs were received after filing the declaration made under Rule 57G. These cases are, therefore, remanded to the jurisdictional Assistant Commissioner for such reconsideration and passing of fresh orders after giving the appellants an opportunity of being heard in the matter. The appeal of the Revenue in the case of Zoloto Industries has already been rejected in view of our findings in paragraph 7 of this order. The references and appeals are disposed of in the above terms.

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