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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jul-31-2000

Reported in : (2000)(121)ELT253TriDel

Appellant : Pure Drinks

Respondent : Commissioner of Central Excise

Judgement :

1. The dispute centers around the question whether, in the facts of the case, it is Rule 57F(1) of the Central Excise Rules, 1944 or whether it is Rule 57F(5) thereof which is applicable.

2. We have heard Shri J.S. Agarwal, ld. Advocate for the assessee and Shri M.M. Dube, ld. JDR for the Department.

3. Appellants are engaged in the manufacture of aerated waters falling under Chapter 22 of the Central Excise Tariff Act. They were also availing of Modvat credit of duty paid on glass bottles received by them as inputs. They were served with a Show Cause Notice dated 4-3-1997 asking them to show cause as to why Central Excise duty amounting to Rs. 42,78,164.20 should not be demanded on the value of clearances of glass bottles sold by them as such and on sale of waste and scrap of glass bottles not paid during the period 1-4-1992 to 19-10-1995 and why penalty should not be imposed. By the impugned order, the Commissioner, Central Excise, New Delhi confirmed the duty demand and imposed a penalty of Rs. 5 lakhs under Rule 173Q read with Rule 9(2). The invoking of the extended

period under the proviso to Section 11A(1) was also upheld.4. Ld. Counsel, Shri J.S. Agarwal has argued that during the period 25-7-1991 to 19-10-1995 appellants had cleared waste and scrap arising out of broken bottles. However, upto 28-2-1994 such waste and scrap was chargeable to Nil rate of duty and thereafter it had become dutiable at the rate of 20% ad valorem. He submits that during the said period of 1-3-1994 to 19-10-1995 an amount of Rs. 6,58,917/- alone was payable.

Ld. Counsel drew attention to the provisions of Rule 57F(5) and Rule 57D to suggest that Modvat credit relatable to broken glass bottles during the course of manufacture is not required to be reversed. For this, he relies on the Tribunal decision in CCE v. Eros Pharma Pvt.

Ltd. [1994 (73) E.L.T. 72]. He also refers to CBEC letter dated 15-1-1988 clarifying that slag generated in the course of manufacture of Copper and Copper articles are to be treated as waste entitling it to the benefit of Rule 57D(1) which provides that "credit of specified duty allowed in respect of any inputs shall not be denied or varied on the ground that part of the inputs is contained in any waste, refuse or by-product arising during the manufacture of the final product or have become waste in or in relation to the manufacture of the final product, whether or not such waste, refuse or by-product is exempt from the whole of the duty of excise leviable thereon or is chargeable to Nil rate of duty or is not specified as a final product under Rule 57A. Ld.

Counsel has contended that the issue to be decided was whether the credit taken on bottles that get damaged/broken during the course of manufacture of the final product requires to be reversed. It had to be borne in mind that the appellants were not the manufacturers of the glass bottles but had purchased the bottles from outside after paying duty. Admittedly some percentage of the bottles get broken during the manufacturing process of Aerated waters. Further in terms of Rule 57F(1)(ii) the requirement of intimating the Asst. Commissioner and the obtain- ing of dated acknowledgement is required only when the inputs in respect of which credit has been allowed under Rule 57A is removed for home consumption or for export. In such cases by a deeming fiction the law provides that such inputs would

be considered to have been manufactured in the said factory. Ld. Counsel has argued that in the instant case there was no 'removal' either for purpose of home consumption or for export. Therefore Rule 57F(1) was not attracted.

There was also no sale or transfer in the facts of the appellant's case. Though this position has been accepted by the Department, the adjudicating authority had still held that Modvat credit will not be admissible.

5. Ld. Departmental Representative has argued that the appellant had cleared waste and scrap of broken glass bottles without following procedure and they had not declared the generation of such waste and scrap to the Department as required under Rule 173B. Further, the appellants had failed to file any Classification List for the removal of glass bottles. The Department had therefore issued a Show Cause Notice alleging contravention of Rules 57F(5) and Rule 57F(1)(ii). The Commissioner in the impugned order has considered all the submissions made by the appellants and had noted that the first issue for decision was whether or not assessee was required to pay proper duty under Rule 57F(5) in respect of waste and scrap of broken glass bottles cleared by them during the period referred to in the SCN and whether Rule 57F(5) was attracted. It is no doubt true that during the course of manufacture of Aerated Waters, some glass bottles do get broken at various stages of handling and they had become scrap. In certain other situations, the glass bottles generated defects due to repeated use and because of this, the glass bottles are rejected as waste. It was conceded by the appellants themselves that they sell glass bottles at regular intervals as waste and scrap. Since the appellants had availed of Modvat credit on the glass bottles as inputs under Rule 57A, the provisions of Rule 57F(5) are clearly attracted in such sale. Rule 57F(5) clearly provided that any waste arising from the processing of inputs can be removed only on payment of duty and by deeming fiction it had been provided that such waste was manufactured in the factory.

There was no allegation that the appellants were manufacturing waste and scrap. It was on the basis of application of the deeming provision that the duty demand has been raised since the deeming provision requires waste or scrap arising from the processing could be removed only on payment of Central Excise duty as if

such waste is manufactured in the factory of the appellants. Ld. JDR referred to the observations in Para 16 of the impugned order to contend that under Chapter Heading 7001.10 glass or glassware would also include broken glass. He also submitted that there was no allegation in the SCN that the appellants were manufacturing waste or scrap of glass. Ld. JDR underlined the fact that the duty demand has been raised on the basis of the provisions of Rule 57F(5) and not on the basis of Rule 57F(1)(ii) at the relevant time. As regards the contention that there was no physical removal of the glass bottles from the factory by the appellants as the bottles were covered under a leasing arrangement and therefore no question of duty can be demanded on the removal of the goods, it was submitted on behalf of the Department that where bottles in respect of which Modvat credit has been taken and they are subsequently transferred to another person against payment, there was in fact a removal for purposes of the Modvat scheme. The Modvat credit taken on the leased bottles would therefore require to be reversed as provided in Rule 57F(1)(ii). Ld.

JDR therefore contended that the impugned order calls for no interference insofar as the assessee's appeal was concerned.

6. We have considered the submissions and the case law relied on by the ld. Advocate for the appellants in support of his contentions. We find that the decision in Charminar Bottling Co. v. CCE Hyderabad [2000 (37) RLT 151] relied on by the appellant does not deal with the question raised in this appeal inasmuch as the said decision was in relation to the question whether breakages of duty paid glass bottles would attract duty under Chapter Heading 7001.10. In the case of B.P.L. Electronics v. CCE [1994 (71) E.L.T. 801], the question that was examined was whether duty exemption can be denied merely for the reason that the manufacturer had raised an invoice but used the goods within the factory of production. It was held that the mere fact of raising an invoice in respect of certain moulds in favour of a financial company will not give rise to duty liability for the reason that excise duty being leviable only on manufacture such duty liability cannot be imposed on the salability of the goods. We find that the Final Order No. 54/2000-D, dated 14-2-2000 in Delhi Bottling Co. v. CCE relied on by the ld. Counsel also does not go into the question presently raised before us, namely

whether Rule 57F(5) was attracted in a case where waste arising in the course of processing of duty paid inputs would attract the provisions of Rule 57F(5) and the credit taken is required to be reversed. It is noted that the assessee did not file any Classification List for the items removed.

7. In these facts and for their failure to pay Central Excise duty to the extent of Modvat credit, we are satisfied that the assessees have become liable and the duty demand is sustainable. We find that on these facts there is also no legal infirmity in invoking the provisions of Rule 57F(1)(ii) read with Section 11A(1) proviso of the Act.

8. In the light of the above, we uphold the impugned order and dismiss the assesses's Appeal.

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