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Commissioner of Central Excise Vs. Nirma Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Feb-25-2002

Reported in : (2002)(82)ECC831

Judge : S T Gowri, G Srinivasan

Appellant : Commissioner of Central Excise

Respondent : Nirma Ltd.

Judgement :

1. This is a department's appeal filed against the decision of the Commissioner (Appeals), Ahmedabad, made in Order-in-Appeal No.43/2000(2-Ahd-II) CE/Commr (A)/Ahd dated 19.1.2000. In the Order-in-Appeal, the Commissioner (Appeals) sustained the demand of Rs. 5,94,141 and Rs. 11,284 but revered the demand of Rs. 18,25,299 and penalty of Rs. 1,00,000 which was confirmed and demanded by the Order-in-Original passed by the Assistant Commissioner.

2. The facts of the case are that the respondent assessee purchased sulphur. This is used in the manufacture of sulphuric acid. It is captively consumed by reacting it with LAB (Linear Alkyl Benzene) when acid slurry and spent sulphuric acid emerge. The acid slurry is thereafter converted into detergent powder which is cleared on payment of applicable excise duty. Spent sulphuric acid is ordinarily cleared on payment of applicable excise duty under chapter sub-heading 28.07 of the Central Excise Tariff Act. However, when cleared for use in the manufacture of fertilizers, complete exemption is availed under Notification 4/97 dated 1.3.1997

and Notification 5/98 dated 23.6.1998 following chapter X of the Central Excise Rules. It would appear that the assessee also clears sulphuric acid itself outside the factory without payment of duty under notifications when intended for use in the manufacture of fertilizers. Show cause notices were issued invoking the provisions of Rule 57-CC of the Central Excise Rules demanding amounts to the tune of Rs. 2,67,885 on sulphuric acid cleared from the factory availing complete exemption on the ground that the respondents have taken modvat credit on the caustic soda lye. Similarly other amounts of Rs. 16,02,434 and Rs. 5,94,141 were also raised on the ground that sale price of spent sulphuric acid cleared for use in the manufacture of fertilizers availing complete exemption and in respect of inputs removed as such, the respondent paid duty from the capital goods modvat account. The Assistant Commissioner rejected the contentions of the assessee who resisted the claim and confirmed the duty of payment of Rs. 24,30,724 and imposed a penalty of Rs. 1 lakh.

On appeal, the Commissioner (Appeals) varied the Order-in-Original as stated in the earlier portion of the order. Hence, the appeal by the department.

3. Learned SDR would argue that the so-called spent sulphuric acid is a sulphuric acid within the terms known to the excise taxation because the strength of the residue product is merely 77% and it cannot be treated as spent sulphuric acid. On a query by the bench, he is unable to furnish the basis on which he says it as spent sulphuric acid. The learned SDR would rely on the observations of the Larger Bench decision of the Tribunal in the case of CCE v. Keti Chemicals at paragraph 10 wherein the Tribunal has referred to the various strength of the sulphuric acid varying from 77% to 100% and the SDR tries to derive support of this for the proposition that the acid of such varying strength are being traded in the market. As against this the learned counsel for the respondent would argue that the final product is acid slurry and the assessee is following sulphonation process. He relies on the observations of the technical book "SYNTHETIC DETERGENTS" by A.S. Davidson and B. Milwidsky, 7th Edition page 161 which states that by oleum process the sulphonation is obtained and he also relies on the larger bench decision of the Tribunal in the above case at paragraph 8 thereof and he states that spent sulphuric acid has been treated as a by-product. He also

relies on the judgment of the Tribunal in the case of Aarti Drugs Ltd. v. CCE 2001 (45) RLT 213 for the proposition that the by-product, Rule 57-CC will not be applicable.

4. We have considered this aspect of the matter. When the final product, viz., acid slurry is produced it is manufactured out of oleum which is a fuming sulphuric acid that is what it mentioned in HSN Notes at page 254. From the process it is clear that the by-product obtained out of the oleum process 70% dark spent sulphuric acid is obtained.

Once that is established in view of the decision of the Larger Bench in Keti Chemicals and a decision of the Tribunal Aarti Drugs supra, Rule 57-CC cannot be invoked.

5. No doubt the learned SDR strenuously brought to our notice about the marketability of the acid having strength of 77% to 100%. In our view, this argument cannot be accepted because in the Larger Bench decision in paragraph 8 it has been specifically held that it is a by-product.

Once that has been held so, it is binding on us and by our decision in Aarti Drugs it has been clearly held that Rule 57-CC cannot be invoked for that purpose.

6. As far as the demand of Rs. 2,67,885 is concerned, the argument of the assessee is that two inputs have been used for making sulphuric acid; one is sulphur and the other is caustic soda lye. No modvat credit has been taken on sulphur since that is wholly exempted. It is also emphasised by the assessee respondent that they have reversed the credit taken on quantity of caustic soda lye contained in the sulphuric acid cleared without payment of duty. He invites our attention to the Circular No. 591/28/2001-CX dated 16.10.2001 given by the Ministry of Finance where it has been clarified as follows: It follows from the provisions that if the manufacturer does not fulfil the requirements of either Sub-rule (2) [i.e. maintaining separate accounts] or Sub-rule (3) [i.e. paying 8% of total price of exempted goods, other than exceptions specified in Clause (a)] then in terms of Sub-rule (1) the assessee shall not be allowed credit on such quantity which is used in the manufacture of exempted goods.

Consequently, where the assessee has not paid the amount, the availment of corresponding credit on inputs is incorrect. The recovery of such credit taken incorrectly is squarely covered by the provisions of Rule 12 (erstwhile Rule 57-I).

7. In our view the circular of the Board clearly clinches the issue in favour of the respondent. No. doubt it has been emphasised by the learned SDR during the argument that the circular has been issued in the context of CENVAT Rules and this has been issued on 16th October, 2001 and it could not have retrospective effect. The argument is quite attractive but the same has to be rejected for the following reasons.

In the circular itself it has been stated in paragraph I as follows: It is directed to say that a doubt has been raised regarding legal provisions for recovery of amount not paid by an assessee in terms of the provisions of Rule 6 of the CENVAT Credit Rules, 2001 (Rule 57-CC of the erstwhile Central Excise Rules, 1944).

In view of the fact that the authority which has issued the Circular has intended to refer to Rule 57-CC of the Central Excise Rules, the argument of the SDR cannot be accepted regarding the circular issued only for the purposes of CENVAT Rules cannot be accepted. As far as the retrospective aspect of the circular is concerned, the circular itself starts with the words "a doubt has been raised" and the tenor of the circular shows that it is clarificatory in nature.

8. In the case of Birla Jute and Industries Ltd. v. ACCE , learned single Judge of the Calcutta High Court, Mrs. Justice Ruma Pal (as her Ladyship then was), at paragraphs 21 & 22, has held as follows: 21. A subsidiary point raised by the respondents in this connection needs to be dealt with separately. It is contended by the respondents that the instructions being administrative in nature cannot operate retrospectively. The respondents have relied upon the following decision in support of this contention: S.B. Patwardhan v. State of Maharashtra in which the Supreme Court These instructions, unlike rules regulating recruitment and conditions of service framed under the proviso to Article 309 of the Constitution or Section 241(2)(b) of the Government of India Act, 1935, cannot have any retrospective effect.

22. In my view the instructions regarding classification cannot be said to be such an instruction which required prospective implementation. The instruction is a decision on the doubt regarding the classification of the yarn. The decision clears the doubt. In effect the ambit of the relevant sub-heading of the Schedule to the Act were construed with reference to the yarn. Such a decision is really classificatory. A classification results in a situation as if the sub-heading as classified always was. Therefore this contention of the respondents must also be rejected.

The said judgment of the Calcutta High Court clearly clinches the issue in favour of the assessee respondent.

9. Hence in view of the above, we have to reject the arguments by the learned SDR and the appeal stands dismissed.

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