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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Aug-23-2002

Reported in : (2003)(85)ECC65

Judge : K Usha, N T C.N.B.

Appellant : Cce

Respondent : Bhaskar Industries Ltd.

Judgement :

1. The issue raised in this appeal at the instance of the Revenue is whether the Commissioner (Appeals) was justified in holding that there is no time limit for availing credit under the Modvat Scheme on capital goods and that there is no provision for prior permission for taking credit provided under the Rule.

2. The respondent assessee had a project to set up a composite mill for spinning, weaving and processing. The first phase related to cotton yarn spinning of different counts. For this phase of the project the company imported capital goods and installed the same during March 1996. They availed modvat credit on its capital goods since the finished product, namely, cotton yarn was dutiable. After manufacturing cotton yarn during the first year and after creating good export market for the same, it went into the second phase of manufacturing grey fabric, a product which is non-dutiable. This part of the project was implemented in September 1998 by using both imported and indigenous machinery. Since the final product at the end of second phase was non-dutiable the assessee kept the option

of availing the modvat credit on capital goods in abeyance for about a year, till implementation of the third phase, namely, the fabric processing. The assessee submitted the required declaration under Rule 57T of the Central Excise Rules with the clear intention that it shall be availing the credit on implementation of the third phase as the final product of third phase was dutiable. On implementation of the third phase it becomes a composite mill and, therefore, entitled to avail of the modvat credit facility which it kept in abeyance during the second phase of manufacturing operation. The assessee sent a letter dated 2.3.2000 to the Assistant Commissioner referring to the above facts and details regarding their process at different phases and requested for permission to utilise the credit of modvat amount now lying not entered in its RG-23C Part II, receipt of the capital goods recorded in Part I of RG-23C. The Assistant Commissioner passed an order dated 31.3.2000 refusing permission for availing such credit on the ground that since the party under Rule 57T(1) showed that the final products would be grey fabrics, they were not entitled to such credit as grey fabrics were completely exempted from payment of duty. He also took the view that filing of declarations under Rule 57-I was not required and, therefore, they are redundant. The original authority further held that in view of the provisions contained under Rule 57-R(1) the items of capital goods installed during the second phase when grey fabrics were manufactured are not eligible for credit of duty. Aggrieved by the above order, the assessee filed an appeal. The Commissioner (Appeals) took the view that the original authority has committed an error in holding that the assessee was not eligible for availing credit on the capital goods installed during implementation of second phase of project for the reason that during that period the final product, namely, grey fabric was exempted from payment of duty. He was inclined to accept the contention raised by the assessee that since the composite mill has been set up in three phases and since on completion of the third phase processed fabric was manufactured as final product, the appellants became entitled to credit on the capital goods installed during second phase. According to the appellate authority there is no time limit for availing credit under the modvat scheme on capital goods. The above position is made clear, according to the appellate authority, by the Circular No. 88/99/94-CE, dated 26.12.94 issued by the Central Board of Excise & Customs. The circular provided that declarations under Rule

57T should continue to be filed by the appellants irrespective of the fact that their factory has not come into existence and/or after got registered and that the credit on the capital goods can be availed only after factory commences production and it is registered. A mere reference to grey fabric as final product in the declaration given at the time of second phase of the project cannot debar from availing the credit at the third phase of the project. At the third phase the grey fabric is only an intermediary product. The Commissioner (Appeals) further held that there is no provision for granting permission to take credit. Rule 57-T provides only filing of declaration and obtaining of the dated acknowledgement of the said declarations. Even if in the letter the assessee had sought permission, the Assistant Commissioner should have rejected the prayer pointing out that there is no provision for granting such permission.

The Commissioner (Appeals) set aside the order in original and allowed the appeal holding that the appellant is entitled to utilise the credit taken on capital goods acquired at the time of second phase after commencement of manufacturing of processed fabric In the third phase.

3. We heard the learned DR and the learned counsel for the respondent.

Reliance was placed by the Revenue-appellant on a decision of this Tribunal in CCE, Coimbatore v. Sengunthar Spinning Mills, 1998 (99) ELT 409 (T). According to us the facts of the case are entirely different from those available in the case in hand. At the time of acquisition of the capital goods the final product coming under Heading 52.02 stood excluded from liability to duty. It was then held that when modvat credit could not be taken at the time when the goods were received, the question of making available a portion of modvat credit thereafter when the Item 52.02 came to be included later under Rule 57Q would not arise. The availability of modvat credit has to be determined at the time when the goods are received in the factory and if no modvat credit was available at that time, the question of subsequently making available any modvat credit would not arise. In the present case, we are concerned with a composite mill and the final product at the third phase is dutiable. According to us, decision of a learned Single Member in Kailash Auto Builders Ltd. v. CCE (A), Bangalore, 2001 (47) RLT 950 (CEGAT-Ban.) relied

on by the respondent-assessee is more akin to the facts of the present case. It was held therein that there is no time limit for utilising the credit and merely because there was no dutiable items, which were required to be cleared, on payment of duty on the date when the capital goods credit was taken, that credit could not be denied. We, therefore, agree with the learned Commissioner (Appeals) that the assessee is entitled to avail the credit on the capital goods installed during implementation of second phase of the project when the composite mill had reached its third phase and where the processed grey fabrics are dutiable items.

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