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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Oct-10-2003

Reported in : (2004)(91)ECC109

Judge : S Kang, M T K.D.

Appellant : Gtc Industries Ltd.

Respondent : Cce

Judgement :

1. M/s. GTC Industries Ltd., Vadodara (GTC) (appellant) are in appeal against the order of the respondent Commissioner, Central Excise, whereby the claim for availing transitional Modvat credit under Rule 57H of the Modvat rules was disallowed. The claim was in respect of two parts:- Claim for cut-tobacco contained in RG-I (BSR stock) of cigarettes figure of cut-tobacco as per formula was calculated.

2. The appellants followed the required procedure contained in Rule 57H and submitted the required documents as demanded by the authorities from time to time. However, the Assistant Commissioner vide order dated 24.11.95 rejected the claim on the ground that original documents were not produced, the Assistant Commissioner did not take cognizance of the photo copies of the records supplied and also ignored the fact that the original RG-I had been taken by DRI office, Baroda on 2.4.95. Aggrieved by the rejection order, special leave application was filed by the appellant before Hon'ble Gujarat High Court at Ahmedabad bearing

No.751/96. Order dated 12.2.96 was passed by the Hon'ble High Court, remanding the matter to the Assistant Commissioner for deciding the matter afresh after giving opportunity to the appellants. It was further directed in para (3) of the said order that:-- "The respondent No. 2 shall demand the documents which are necessary for deciding the dispute in question and the Petitioner shall comply with the same within a reasonable period. After receiving the same and after hearing the Petitoner company, an order shall be passed afresh by the respondent No. 2. The impugned order dated 25,11.95 is directed to be treated as a tentative order".

3. The Assistant Commissioner passed Order No. MOD/496/97 on 31.1.97.

The order mentioned that no prior permission is required for availing of transitional credit under provisions of Rule 57H of Central Excise Rules. However, in case it was found, at a later stage, that, the credit taken for which is not eligible, appropriate legal action will follow. The appellants took credit of Rs. 59,01,123.92 pursuant to Assistant Commissioner's Order above.

4. On 3.6.97, show cause notice was issued by the Commissioner of Central Excise, Vadodara alleging mis-statement and suppression of facts and asking the company to show cause why credit of Rs. 59,01,123.92 should not be recovered, and equivalent penalty under Rules 571 (4) should not be imposed, besides proposing why interest under Rule 571(5) should not be recovered and penalty under Rule 209 should not be imposed.

5. After exchange of certain correspondence between appellants and the Commissioner relating to permission to inspect documents etc. and after hearing the appellants, the Commissioner vide Order-in-Original No.89/Demand/97 dated 19.11.97 ordered recovery of Modvit credit amounting to Rs. 59,01,123.92 and also demanded interest and imposed penalties.

Thereafter the appellants came in appeal before the Tribunal vide Appeal No. E/740/98/NB. The Tribunal vide Final Order No.A/703/98/NB(DB) dated 14.8.98 remanded the matter to CCE, Vadodara holding that there was no suppression and also that the judgment of Hon'ble CEG AT in Collector of Central Excise v. Sirpur Paper Mills case 2996 (82) ELT 212, is not applicable to the facts of this case.

The matter was re-adjudicated by the Commissioner vide impugned order dated 28.2.2000 passed by CCE, Vadodara. The Commissioner confirmed the demand of duty and penalty. The present appeal is against the order dated 28th Feb. 2000.

7. During the hearing the counsel has referred to various events alleging that access to some important document was denied. However, the arguments were confined to the legal grounds for which the denial of Modvat credit was contested. We have considered various arguments.

It is noticed that when the matter was before this Tribunal earlier, on appeal against the order dated 18.12.97, passed by the Commissioner, the Tribunal had examined the case of the Modvat claim of the appellants, on merit. The Tribunal had concluded that, the charge of suppression of fact levelled against the appellants does not have any basis. The Tribunal also held that the reliance placed by the Commissioner in CCE. v. Sirpur Paper Mills (supra) was notcorrect, as set-off procedure to claim benefit under Notification No. 355/86-CE dated 24.6.86 was different from the provisions involved in that case.

8. Pursuant to the aforesaid orders of the Tribunal and relying on the judgment of the Tribunal in Sirpur Paper Mills case (supra) the credit was once again denied and the duty demand was confirmed by the Ld.

Commissioner. However, as stated above, the Tribunal had examined the applicability of the ratio of Tribunal's judgment in Sirpur case and arrived at a conclusive finding to the effect that the ratio of Sirpur Paper Mills case is not applicable to the facts of this case.

9. Notwithstanding the above position, we note that, Collector in his impugned order has held that the transitional credit was not admissible for the reason that (i) the appellants had taken credit under Notification No. 355/86-CE dated 24.6.86, whereas Rule 57H(IB) stipulates that, credit can be permitted only in cases where no credit has been taken by the manufacturer in respect of such inputs under any other rule or notification, (ii) Since one to one correlation was required, the duty

paid on the cut-tobacco utilized for the manufacture of cigarettes was already set-off against the duty paid on the cigarettes cleared. Therefore, the question of granting transitional credit of the accumulated duty credit cannot be considered, since Rule 57H(3) speaks only of the credit which was not utilized.

10. We note that the grounds for denial of credit mentioned above are totally erroneous besides being contrary to the findings arrived at in the Tribunal's remand order. It is noted that, the Notification No.355/86-CE dated 24.4.86, is not a notification permitting credit of duty paid on inputs. A reading of the notification makes this very clear. The notification exempts cigarettes from so much of duty of excise leviable under Central Excise Act, as is equivalent to the duty of excise already paid on "cut-tobacco". This notification cannot be classified to be a notification permitting credit of duty paid on inputs. In terms of the said notification finished goods duty is reduced to the extent of duty of excise actually paid on the inputs contained in the finished products. As against this, notification providing credit of duty paid on inputs does not require that the finished product duty exemption will be confined only to an amount equivalent to the duty paid on the input actually contained in finished goods. In other words, even if the actual duty paid on the inputs contained in the finished goods may be a small fraction of the duty paid on the finished goods in a scheme permitting credit of duty paid on the inputs, the manufacturer is permitted to utilize the entire credit of duty paid on the consignment of inputs immediately after receipt of such inputs in the factory, notwithstanding the fact that the amount of input credit duty with reference to actual contents in the finished goods is much lower. We note that, Notification No.355/86-CE requires strict determination of duty reduction on finished goods by ascertaining the duty paid on the actual quantity of inputs contained in the finished goods. Therefore, the findings of the Ld.

Commissioner that the taking of benefit under Notification No.355/86-CE, amounts to taking credit under any other rule or notification cannot be sustained.

11. Besides even for the sake of argument, one were to consider that Notification No. 355/86-CE is a notification providing credit, even in that event, on the date of rescinding that notification i.e. on 16.3.1995, it cannot be said that, the

manufacturer had taken credit under Notification No. 355/86 in respect of stock of duty paid cut tobacco in balance. Therefore, at the point of advent of Notification No. 9/95-CE (NT), the transactions under rescinded Notification No.355/86 ceased to exist. Therefore, from 16.3.95 onwards notwithstanding the so-called credit taken under Notification 355/86 for the period prior to that date, on 16.3.95 it cannot be said that the appellants had taken credit under Notification No. 355/86. It is also noticed that, the excise duty on cut-tobacco was at a specific rate. Under Notification No. 355/86 there was a cap of duty relief on the cigarette. The relief was equivalent to the duty paid on cut-tobacco actually contained in the finished cigarettes. Therefore, for whatever stock of cut tobacco was present in the factory, it was obvious that, equivalent amount of credit was available as a balance credit, to be taken under Rule 57H.12. As regards the other ground namely, consumption of the entire amount of credit, at the point of rescinding the Notification No.355/86, we are unable to see, as to how the credit equivalent to duty paid on cut-tobacco lying in stock on 16.3.95, can be said to have been utilized in respect of duty paid on finished goods (cigarettes) cleared prior to 16.3.95. Under the set-off scheme, concessional duty on cigarettes was assessed by the officers present in the factory upto 16.3.95, after ensuring that the cut-tobacco from which the cigarettes were manufactured was duty paid. Once this position is accepted, change over to the Modvat credit procedure cannot require the manufacturer to produce a fresh set of evidence for duty payment. Therefore, the presumption that credit has been utilized for paying duty on cigarettes already cleared and there is no balance credit for permitting its transfer under Rule 57H is without any basis.

13. The next argument of the Commissioner is that duty-paying documents to substantiate the credit amount have not been furnished, has also to be rejected in view of our observations in the preceding para.

14. The Tribunal in its remand order dated 14.8.98 had categorically held that the suppression clause is not applicable. Despite this finding, the Commissioner had re-opened the issue on limitation and held that the appellants had indulged in suppression. This finding virtually amounts to challenging the correctness of the findings of the Tribunal. The order of the Tribunal cannot be challenged in de novo proceedings. In case the department had dis-agreement with this finding rendered

by the Tribunal, the same could have been challenged by filing an appeal to the appropriate higher forum. Therefore, the finding of the Commissioner regarding applicability of the suppression clause deserves to be set aside.

15. Since we have held that the denial of credit was not supported by law, we hold that the orders proposing the recovery of interest and imposition of penalty also deserve to be set aside. Accordingly, the appeal succeeds, the order of the Commissioner is set aside and the appeal is allowed with consequential relief.