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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Dec-11-2003

Reported in : (2004)(91)ECC428

Judge : A T V.K., P Chacko

Appellant : Cce

Respondent : H.E.G. Ltd.

Judgement :

1. This appeal is against a common order-in-original dated 27.9.2001 passed by the Commissioner of Central Excise, Raipur in adjudication of 16 show - cause notices issued from time to time during July 1997 to April, 2001. The show-cause notices had proposed to disallow capital goods duty credit to the respondents for successive periods comprised in October, 1995 to September, 2000. The total Modvat credit so proposed to be denied to the respondents was Rs. 1,93,42,097/-.

2. M/s. H.E.G. Ltd (respondents) had two factories one at Durg (Chattisgarh) and the other one at Raisen (Madhya Pradesh) the former manufacturing sponge iron and the latter manufacturing graphite electrode. In their Durg factory premises, they had a captive thermal power plant (hereinafter referred to as 'CPP') of 12.8 MW capacity having three boilers, one steam turbine and a generator. The stem generated in these boilers was used to generate electricity which was used captively for manufacture of sponge iron. The surplus electricity (which formed a substantial part of the electricity generated from the CPP) was transmitted to the

Raisen factory through the Gride of MP Electricity Board. M/s HEG had availed credit of the duty paid on various components, spares and accessories of the CPP during the aforesaid period (October 95 to September 2000) under Rule 57-Q (upto 31.3.2000) and under Rule 57-AB (from 1.4.2000) of the Central Excise Rules, 1944 and utilized the credit for payment of duty on their final product (sponge iron). The show-cause notices sought to recover the entire duty under Rule 57-U/rule 57-AH read with Section 11-A of the Central Excise Act on the main ground that the credit was not admissible for non-fulfillment of condition set out in the proviso to sub-rule (2) of Rule 57-F inasmuch as the electricity generated from the CPP had not been fully utilized within the factory for manufacture of sponge iron as a part of the electricity has been wheeled out of the factory for use elsewhere. Another ground raised by the Department was that, in terms of the proviso to sub-rule (1) of Rule 57-R, the credit was not available to the part, components and accessories of the CPP which wa used for generating electricity which was not an excisable product. Yet another ground raised for denying the credit was that the CPP was not eligible capital goods under Rule 57-Q as it was not concerned with the manufacture of sponge iron and, therefore, its parts, components and accessories would not fall within the purview of capital goods. Certain order technical grounds were also raised in some of the show-cause notice, which we need not consider in this appeal as the Revenue-appellant's challenge in this appeal is only with reference to the show-cause notices.

3. After examining the allegations in the show-cause notices and M/s HEG's response to the allegations, and after hearing both the sides, the learned Commissioner held that the party was entitled to avail the Modvat credit. Hence the present appeal of the Revenue.

4. We have heard both the sides and examined the submissions. The common issues which had arisen from the show cause notices were stated by the Commissioner as under:- i) Whether parts. accessories/spares of Captive Power Plant qualify the test of 'CAPITAL GOODS' UNDER THE ERSTWHILE rule 57Q/57AB of the Central excise Rules, 1944 for availment of capital goods duty credit.

ii) Whether the proviso to Rule 57-R of the central Excise Rules/57-AD(3) of the said Rules, disentitle the availment of capital goods duty credit on parts/spares/accessories of Captive Power Plant/Boiler as no excise duty is payable on the steam/electricity generated in the Captive Power Plant or Boiler as also sine surplus Electricity so generated is supplied to their sister concern through MPEB grid and is not used exclusively in their factory in the manufacture of Sponge Iron and as the electricity so generated/steam produced are also used for various other purposes other than that for the manufacture of Sponge Iron for which no separate recording and accounting is being done.

iii) whether the said Captive Power Plant has any concern in any way in the manufacture of their final product 'Sponge Iron', as the same is exclusively used for the generation of Electricity." Before us, both the sides have addressed the above issues with reference to the relevant Rules and case law. The learned SDR submitted that as the electricity generated from the CPP fabricated out of the various components, parts and accessories on which the Modvat credit in question was taken by the party was not an excisable produce, availment of the credit was hit by the prohibition contained in sub-rule

(1) of Rule 57-R.He was pressing into service the proviso to the sub-rule. The learned SDR also heavily relied on the provisos to the sub-rule

(2) of Rule 57-R with particular emphasis on the second proviso which was in force during the first held of the period of dispute. He submitted that as the entire electricity generated by the CPP had not been used within the factory the condition laid sown in the 2nd proviso was not fulfilled for capital goods duty credit. On the other hand, the learned Counsel for the respondents argued that nothing contained in sub-rule

(1) or sub-rule

(2) of Rule 57-R could be relied upon to deny the Modvat credit which was otherwise admissible to the respondents under the substantive provisions of Rule 57-Q/Rule 57-AB. It was argued that sub-rule

(2) of Rule 57-R had been enacted not to create any new obligation or right for assessee but only as a matter of abundant precaution. In this connection, the Counsel quoted from "Principles of Statutory Interpretation" (7th Edition 1999) by Guru Prasanna Singh, as also from 'the Law and Practice of Income-tax (8th Edition) by N.A.Palkhiwala and B.A. Palkhiwala and submitted that any superfluous provision made by way of abundant precaution was not to be relied on in interpretating the substantive provisions already made by the legislative authority. In this connection, Counsel also referred to the decision of this Tribunal's larger Bench in Ballarpur Industries Ltd. v. CCE, 2002-Taxindiaonline-27-CESTAT-LB as also the decision of this Tribunal in German Remedies Ltd. 2002-Taxindiaonline-30-CESTAT-MUM.Counsel submitted that he boilers, turbine and generator and all components/part thereof were integral parts of the CPP which generated electricity which was an indispensable requirement for the manufacture of the specified final product, namely, sponge iron. Such components, parts and accessories were covered by the definition of capital goods under Rule 57-Q as amended from time to time by Notification No.11/95-CE(NT), Notification No. 6/97-CE(NT) dated 1.3.97 and so on during the relevant period. In this context, the learned Counsel relied on the Supreme Court's decision in CCE v. Jawahar Mills Ltd. 2002-TAXINDIAONLINE-87-SC-CX Under the new Rules which were brought into force from 1.4.200, all goods falling under Chapters 82, 84, 85 and 90 and components, spares and accessories thereof were still within the ambit of the definition of capital goods. Therefore, even after 31.3.2000 boilers, turbine, generator and all components, spares and accessories thereof were eligible capital goods for Modvat credit. As the CPP was used within the factory for generation of electricity which was, in turn, used for the manufacture of sponge iron, which was the dutiable final product, and as the electricity generated by the CPP was not a final product, nothing contained in sub-rule

(1) of Rule 57-R barred the respondents from availing the Modvat credit in question. The Counsel particularly pointed out that the second proviso to sub-rule

(2) of Rule 57-R, which contained the expression 'for any other purpose' enabled the party to avail Modvat credit on the capital goods used for generation of electricity even for purposes other than for manufacture of sponge iron. Hence the

fact that a part of the electricity generated was wheeled out through MPEB grid to the Raisen factory did not detract from their right to avail Modvat credit on the components, parts, etc. of the CPP.In his rejoinder, the learned SDR submitted that sub-rule

(2) of Rule 57-R had been enacted with a specific purpose an was not a superfluous provision. Where the conditions set out under that provision were not fulfilled, the requirements of Rule 57-Q also remained unfulfilled.

Further, the DR submitted that he cited case of Ballarpur Industries was distinguishable inasmuch as, in that case, what was considered was the input credit scheme and not capital goods credit scheme. He also sought to distinguish the cited case of German Remedies by submitting that sub-rule (2) of Rule 57-R was not considered in that case.

5. We have carefully examined the submissions. Only four grounds have been raised in the present appeal. Relying on sub-rule

(6) of Rule 57-Q, which came into force on 1.3.97, the appellant had, under Ground No. 7(i), virtually conceded that credit of duty could be taken in respect of capital goods used in the manufacture of other capital goods for use in the manufacture of final product. In the instant case, however, the appellants seek to deny Modvat credit on the various parts, components, etc. used for fabrication of CPP on the ground that the CPP and electricity generated therefrom are not excisable. In so far as this plea of non-excisability of CPP raised by the appellant for denying the Modvat credit to the respondents it concerned, we note that it has been consistently held by this Tribunal that there was not such requirement in Rule 57-Q that, for credit to be taken on any part of any capital goods, the capital goods itself must be dutiable. On of such decisions of the Tribunal has been cited by the Counsel and the same is Mahalaxmi Glass Works Ltd. v. CCE [1999

(113) ELT 558]. As for the appellant's plea of non-excisability of electricity raised for denying the credit to the respondents, we note that such a plea is also not well founded on the provisions of Rule 57-Q inasmuch as electricity generated by the CPP was by no stretch of imagination a final product of the respondents as rightly

found by the Commissioner. for this very reason, the reliance placed by the appellant on sub-rule

(1) of Rule 57-R is also misconceived. Under Ground No 7(ii), the appellant has stated that stem or electricity generated in the respondents' factory are not to be treated as intermediate product for the manufacture of sponge iron. This ground has ben raised apparently in support of the contention that the benefit of sub-rule

(2) of Rule 57-R is not available to the respondents. However, we note, this ground framed by the appellant is counterproductive inasmuch as it is the respondents' plea that stem or electricity is neither intermediate product not final product and, therefore, Modvat credit taken on the capital goods used for generating stem and electricity cannot be disallowed under Rule 57R on the ground that electricity is not excisable. yet another ground raised in this appeal is that sub0-rule

(2) of rule 57-R as amended w.e.f. 16.3.95, which allowed credit in respect of capital goods used for generation of electricity for manufacture of excisable goods or for any other purpose, was in force only upto 22.7.95 and, therefore, not credit could have been allowed for the subsequent period. But is appears to us that the sub-rule (with the relevant provision was in force beyond the said date also. This apart, we find, after carefully examining the legislative history of the capital goods credit scheme, that the learned Commissioner has rightly found that, under the provisions of Rule 57-Q (upto 31.3.2000) and the new Rule (from 1.4.2000), the respondents were entitled to avail Modvat credit on such capital goods, not affected by the provisions of Rule 57-R (2). We are in full agreement with the view taken by the Commissioner and are supported by the Larger bench decision in Ballarpur Industries case as also the decision in German Remedies case (supra). In the case of Ballarpur Industries, the question was whether modvat credit of the duty paid on fuels used in diesel generating sets for generation of electricity for manufacture of excisable goods was admissible to the assessees under Rule 57-A. A plea was raised by Revenue that electricity was not excisable goods, and therefore, availment of Modvat credit on the input used for generating electricity was hit by the provisions of Rule 57-D(2), which provided that credit of duty on any

inputs shall not be denied or varied on the ground that any intermediate products have come into existence during the course of manufacture of the final product and that such intermediate products are, for the time being, exempt from the whole of the duty of excise leviable thereon or are chargeable to nit rate of duty. The larger Bench held that Rule 57-D(2) did not set out any condition precedent for extending Modvat credit to the assessee and that non-fulfilment of any condition could not result in any disentitlement of the assessee to the credit.

This ratio of the decision of the larger Bench was followed in the case of German Remedies also. We find that, the provisions of Rule 57-R(2) being similar to those of Rule 57-D(2), the above ratio is applicable to the instant case also. However, we leave open the question whether the provisions are superfluous or not. We hold that the Modvat credit taken by the respondents cannot be denied to them on the ground of non-fulfilment of any condition set ut under sub0rule (2) of Rule 57-R as the Revenue has not case that the party did not fulfill the requirements of Rule 57-Q/Rule 57-AB. We shall did not fulfill the requirements of Rule 57-Q/Rule 57-AB. We shall not come to the last ground raised in this appeal, which is to the effect that the supply of surplus electricity by the respondents outside the sponge iron unit through MPEB grid amounted to non-fulfilment of the condition that the electricity generated by the capital goods should be solely and exclusively used captively for the manufacture of sponge iron and no part of it should be used otherwise. The appellant has stated that this issue was not examined by the Commissioner. We find that the said issue was exhaustively discussed by the adjudicating authority in para 8.5.2 of the impugned order. The authority has held that the expression 'any other purpose' used in the proviso to Rule 57-R (2) has wide scope and the use of electricity was not confined within the factory. The Commissioner has also observed, quite rightly, that restricting the use of surplus electricity within the factory is neither logical not possible.

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