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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jun-03-2004

Reported in : (2004)(95)ECC689

Judge : S Kang, a T V.K.

Appellant : Paswara Papers Ltd.

Respondent : Cce

Judgement :

1. The issues involved in this appeal, filed by M/s. Paswara Papers Ltd., are whether the Cenvat Credit of duty paid on light Diesel Oil (LDO) and Furnace Oil (FO) used in the manufacture of exempted products is available to them and whether the demand raised in show cause notice dated 4.7.2002 is time-barred.

2. Shri Krishan Kant, learned Advocate, mentioned that the Appellants manufacture Kraft Liner/Karft Board and avail of Cenvat credit on the various inputs used in the manufacture of their final product; that they are also availing the benefit of Notification No. 6/2000-CE, dated 1.3.2000 (and subsequently Notification No. 3/2001-CE, dated 1.3.2001), which exempts wholly the first clearances of 3500 M.T. of paper and paper products; that they had crossed the limit of 3500 M.T. on 30.6.2000 and upto 30.6.2000, they availed the Cenvat Credit of the duty amounting to Rs. 21,18,351 paid on LDO and FO; that out of the said Credit, they utilised Rs. 80,300 towards payment of duty in June 2000 and the remaining amount was utilized towards payment of duty in July 2000; that they had

deposited the said amount by T.R. 6, Challan dated 10.11.2001 under protest; that two show cause notices dated 4.7.2002 for denying the Credit for the period 1.4.2000 to 30.6.2000 and dated 10.4.2002 for denying credit for the period 1.4.200 to 2.7.2001 had been issued to them; that the Commissioner, under the impugned order, confirmed the demands and imposed the penalties besides charging the interest on the ground that the Credit was not admissible to them during the period the final product manufactured by them was exempted wholly from the payment of duty.

3. The learned Advocate submitted that Sub-rule (1) of Rule 57AD of the Central Excise Rules, provides that Cenvat Credit shall not be allowed on such quantity of inputs which is used in the manufacture of exempted goods, except for the circumstances mentioned in Sub-rule (2); that thus Sub-rule (1) is subject to Sub-rule (2) and the circumstances mentioned in Sub-rule (2) are "Except inputs intended to be used as fuel"; that the meaning of this phrase is that the credit shall not be allowed on all inputs used in exempted goods but full credit shall be allowed on input "Fuel" even if the input is used in the exempted goods; that Sub-rule (2) has created an exception in respect of inputs vised as fuel and neither any Credit is required to be reversed for such inputs used in the manufacture of final product cleared without payment of duty nor such final products are called upon to pay an amount of 8% of their price. The learned Advocate, further, submitted that the Commissioner has himself admitted in the impugned order that Sub-rule (2) of Rule 57AD permits the taking of credit on inputs fuel used in the manufacture of exempted goods; that thus the taking of credit on Fuel used in the manufacture of exempted goods is not disputed by the Department; that the main contention of the Adjudicating Authority is that both dutiable and exempted goods should be manufactured simultaneously; that Sub-rule (2) does not prescribe such condition of simultaneous manufacturing of dutiable and exempted products; that the main condition in Sub-rule (2) is that a manufacturer should manufacture both dutiable and exempted final products; that the Appellants are also manufacturing both dutiable and exempted goods in a financial year and they have also declared their intention to manufacture both categories of products in a financial year in advance at the time of filing Classification Declaration under Rule 173B of the Central Excise Rules; theat the Tribunal in the case of Rochiram & Sons v. CCE, Jaipur,

2003 (88) ECC 112 : 2003 (155) ELT 96 (J) has held that Sub-rule (2) of Rule 57AD does not require an assessee to manufacture, on day-to-day basis, both dutiable and exempted goods. Reliance has also been placed on the decision in the case of Indore Steel & Iron Mills Ltd, v. CCE, Indore, 2002 (147) ELT 611 (T) wherein it has been held that "a comprehensive and harmoneous reading of the above provisions leads me to conclude that the rules have created an exception in respect of the inputs used as fuel".

4. The learned Advocate also contended that the extended period of limitation is not invocable and the show cause notice dated 4.7.2002 is time-barred as the same is beyond the period of one year as provided under Section 11A of the Central Excise Act; that they had filed the Classification Declaration and had also filed monthly R.T. 12 Returns; that thus the Appellants had disclosed all material information and there was no suppression on their part; that they had always mentioned that they would be taking credit on fuel which was used in the manufacture of exempted products and as such neither there was any suppression nor mis-statement of facts; that the Superintendent of Central Excise had asked for comments from them under letter dated 17.10.2000 and the Appellants in their reply dated 20.10.2000 had categorically submitted that they would take the Cenvat Credit on fuel used in the manufacture of exempted product. He, finally, mentioned that no penalty is imposable on them as the issue involved is purely a legal issue involving interpretation of Rule 57AD; that as the entire amount has been deposited by them before the issue of show cause notice, no penalty is imposable on the Appellants. He has placed reliance on decision in the case of Rashtriya Ispat Nigam Ltd. v. CCE, 2003 (161) ELT 285 (T) wherein the Tribunal has held that penalty is not imposable under Section 11AC of the Central Excise Act as well as under Rule 173Q of the Central Excise Rules, 1944 when duty is deposited before issue of Show Cause Notice; that the appeal filed by the Commissioner has been dismissed by the Supreme Court as reported in 2004 (163) ELT A53.

5. Countering the arguments, Shri D.N. Choudhary, learned SDR, submitted that Rule 57AD (2) is applicable when a manufacturer manufactures both dutiable goods and exempted products; that it is not in dispute that the Appellants only

manufacture one product which enjoys a quantitative exemption; that till the time they clear the said quantity of goods, they do not, rather cannot, remove goods on which duty is payable; that thus it cannot be claimed by the Appellants that they are manufacturing both dutiable and exempted products. As such their case does not fall within the exception provided in Sub-rule (2) of Rule 57AD; that further the phrase 'except inputs intended to be used as fuel' in Sub-rule (2) only denotes that the procedure set out for inputs commonly used in the manufacture of exempted as well as dutiable goods shall not apply to inputs intended to be used as fuel.

He also submitted that the decision in the case of Rochi Ram & Sons is not applicable as in that matter M/s. Rochi Ram & Sons were manufacturing both exempted and dutiable goods; that as the facts are different the ratio of the said decision is not applicable; that in the facts of the present matter Sub-rule (1) of Rule 57AD applied which clearly mandates that Cenvat Credit shall not be allowed on inputs which are used in the manufacture of exempted goods. Regarding invocation of extended period of limitation, the learned SDR reiterated the findings as contained in the impugned Order.

7. We have considered the submissions of both the sides. The facts which are not in dispute, are that the Appellants avail of benefit of Notification No. 6/2000-CE (or subsequent Notification No. 3/2001-CE) which exempts from payment of whole excise duty upto the first clearances of 3500 M.T. of paper and paper products manufactured out of pulp containing 75% of non-conventional raw-material from the stage of pulp making, during a financial year. The appellants after availing the exemption upto 3500 M.T. of their product, clear the goods on payment of appropriate rate of duty. They also avail of Cenvat Credit of duty paid on LDO and FO used as fuel in the manufacture of their final products. Rule 57AB (1) of the Central Excise Rules, 1944 empowers a manufacturer of final product to take Cenvat Credit of the duty paid on inputs. Rule 57AC contains conditions for allowing Cenvat Credit. Rule 57AD contains provisions relating to "Obligation of manufacturer of dutiable and exempted goods". Sub-rule (1) provides that "Cenvat Credit shall not be allowed on such quantity of inputs which is used in the manufacture of exempted goods, except in the circumstances mentioned in Sub-rule (2)". Thus, the Credit cannot be taken in respect of any inputs which is used in

the manufacture of exempted goods. Sub-rule (2) contains exception to the provisions of Sub-rule (1). Sub-rule (2) of Rule 57AD reads as under: "(2) Where a manufacturer avails of Cenvat credit in respect of any inputs, except inputs intended to be used as fuel, and manufactures such final products which are chargeable to duty as well as exempted goods, then, the manufacturer shall maintain separate accounts for receipt, consumption and inventory of inputs meant, for use in the manufacture of dutiable final products and the quantity of inputs meant for use in the manufacture of exempted goods and take Cenvat credit only on that quantity of inputs which is intended for use in the manufacture of dutiable goods. The manufacturer, opting not to maintain separate accounts shall follow either of the following conditions, as applicable to him, namely: (i) final products falling under Chapters 50 to 63 of the Schedule to the Central Excise Tariff Act, 1985; (ii) tyres of a kind used on animal drawn vehicles or handcarts and their tubes, falling within Chapter 40; (iv) newsprint, in rolls or sheets, falling within Chatper heading No. 48.01; the manufacturer shall pay an amount equivalent to the Cenvat credit attributable to inputs used in or in relation to the manufacture of such final products at the time of their clearance from the factory, or (b) if the exempted goods are other than those described in Clause (a) above, the manufacturer shall pay an amount equal to eight per cent of the total price, excluding sales tax and other taxes, if any paid on such goods, of the exempted final product charged by the manufacturer for the sale of such goods at the time of their clearance from the factory." 7.1 A perusal of Sub-rule (2) reveals that if inputs are used in the manufacture of final products which are chargeable to duty as well as exempted goods, the manufacturer has two course of action open to him -- (i) to maintain separate accounts for receipt, consumption and inventory of inputs meant for use in the manufacture of dutiable final products and the quantity of inputs meant for use in the manufacture of exempted goods and take credit only on the quantity of inputs which is intended for use in the manufacture of dutiable goods; or (ii) If separate accounts are not maintained/ the manufacturer either shall pay an amount equivalent to the Cenvat credit or shall pay an amount equal to 8% of the total price of the exempted goods.

7.2 These provisions of Sub-rule (1) are not applicable to inputs intended to be used as fuel. It is thus apparent from Sub-rule (2) that if inputs, except fuel, are

used in the manufacture of both dutiable goods and exempted goods, a manufacturer has either to maintain separate accounts or pay an amount equal to 8% of the price of the exempted goods or pay an amount equivalent to the Cenvat Credit. The appellants admittedly avail of full exemption from payment of duty upto 3500 M.T. of their products. It is not the case of the appellants that they are also manufacturing any other dutiable final product during the period they avail of benefit of Notification No. 6/2000 or 3/2001. Thus in a financial year they avail exemption from payment of entire duty of excise on their products upto 3500 M.T. They, as such, during the period of availment of exemption, cannot claim that the impugned inputs are used in the manufacture of both dutiable goods and exempted goods.

When they exhaust their exemption limit specified in Notification No.6/2001 (or 3/2001), they start clearing the goods on payment of appropriate duty. During this period of a financial year, they do not clear any duty paid goods. Thus the appellants do not fall within the "circumstances mentioned in Sub-rule (2)". In Rochi Ram & Sons case, the appellants were manufacturing Wrist Watches of MRP below Rs. 500 per piece which were wholly exempt from payment of duty and the watches of MRP above Rs. 500 which were chargeable to duty. The Modvat Credit was sought to be denied to them on the ground that they had manufactured only exempted watches during the period of dispute i.e. a few months. In such facts and circumstances, the Tribunal held that the period cannot be segregated into two periods and provisions of Sub-rule (2) are attracted when manufacturer is manufacturing both dutiable and exempted goods and is not maintaining separate accounts for inputs. The facts in the present matter are different as the appellants herein avail of total exemption up to 3500 M.T. in a financial year and do not manufacture goods which are chargeable to duty during the period they avail of the benefit of Notification No. 6/2000 or 3/2001. In National Engineering Industries Ltd. also, the assessee was manufacturing goods which were chargeable to duty as well as not chargeable to duty. Thus, we hold that the appellants are not eligible to take Cenvat Credit of duty paid on LDO and FO during the period they clear their final products availing full exemption from payment of duty under Notification No. 6/2000 or 3/2001.

8. We, however, find substance in the submission of the learned Advocate that the extended period of limitation cannot be invoked as they had not suppressed any fact from the Department. The Revenue has not controverted the contention of the appellants that in their Classification Declaration they had clearly indicated their intention to avail Cenvat Credit of duty paid on inputs intended to be used as fuel. Further, the appellants have also filed R.T. 12 Retuns which will clearly reveal the removal of goods without payment of duty and the availment of Cenvat Credit of duty paid on LDO and FO. There is no force in the finding of the Adjudicating Authority that by mentioning Rule 57-C and 57-CC instead of Rule 57AD of the Central Excise Rules, the appellants had made any mis-declaration. The Department has initiated action late on the declarations filed by the appellants which is evident from the letter dated 7.10.2000 of the Range Superintendent asking them to offer their "comments on the condition No. 3 mentioned in the declaration." This goes to show that the appellants on their part had disclosed all the material facts to the Department.

Accordingly, it cannot be alleged by Revenue that there was any suppression of facts with an intent to evade payment of duty. The decision of the Supreme Court in the case of Pushpam Pharmaceutical Co.

Ltd. v. CCE, 2002 (80) ECC 6 (SC) : 1995 (78) ELT 401 (SC) is squarely applicable in the present matter wherein it has been held by the Apex Court that the act must be deliberate and suppression of facts does not mean any omission. We, therefore, hold that the extended period of limitation cannot be invoked in the present matter. Accordingly, the matter is remanded to the Jurisdictional Adjudicating Authority to recompute the demand, As the issue involved is the interpretation of provisions of Rule 57AD and the Cenvat Credit was availed of after making declaration, no penalty is imposable in the-present matter.

Accordingly, we set aside the penalty imposed on the appellants,

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