

Commissioner of Central Excise and Customs Vs. Greaves Cotton Ltd.

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Court : Mumbai

Decided On : Aug-04-2007

Reported in : 2007(5)BomCR241; (2007)109BOMLR1640; 2007(121)ECC357; 2007LC357(Bombay); 2008(225)ELT198(Bom)

Judge : N.V. Dabholkar and ;M.G. Gaikwad, JJ.

Acts : [Central Excise Act, 1944](#) - Sections 11AB and 11AC; Cenvat Act; Cenvat Credit Rules, 2002 - Rule 7(4)

Appeal No. : First Appeal No. 673 of 2007

Appellant : Commissioner of Central Excise and Customs

Respondent : Greaves Cotton Ltd.

Advocate for Pet/Ap. : Alok Sharma, Assistant Solicitor General

Judgement :

N.V. Dabholkar, J.

1. The Department has approached this Court for the purpose of challenging judgement and order dated 13-11-2006 passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Mumbai ('CESTAT', for short) in Appeal No. E/647/2006.

2. It is the case of the Department that during the course of Audit of Records of the respondent by Internal Audit Officers of Central Excise, it was observed that in the Cost Audit Report for the year 2002-2003, for the physical verification of inventory, there was shortage of raw material worth Rs. 33,42,161/-. The amount involved CENVAT (Central Value Added Tax) Credit of Rs. 5,34,746/-, which was claimed by the assessee, although raw materials were not used in or in relation to manufacture of the final product. Thus, CENVAT Credit worth Rs. 5,34,746/ was claimed without justification or rather without being entitled to do so.

Show-cause notice dated 15-12-2004 was issued directing the assessee to show cause as to why demand of Rs. 5,34,746/- may not be confirmed, why interest under Section 11AB of the [Central Excise Act, 1944](#) may not be recovered and why penalty under Section 11AC of the [Central Excise Act, 1944](#) may not be imposed. Upon considering the statement of Shri S.P. Ponde, Senior Executive (Commercial) and Authorized Signatory of the noticee for Central Excise matters, as recorded on 09-02-2005 and even after taking into consideration a letter-cum-certificate dated 16-05-2004 furnished by Shri Dhananjay V. Joshi, Cost Accountant of the noticee, the Joint Commissioner of Central Excise & Customs, Aurangabad confirmed the demand notice for recovery of wrong CENVAT Credit worth Rs. 5,34,746/-, claimed by the assessee. Learned Joint Commissioner also ordered recovery of interest under Section 11AB and imposed penalty equal to the wrong claim of CENVAT Credit. This was done by observing thus:

The Noticee in the instant matter, could not account for shortage of inputs of huge value Rs. 33.42 lakh in physical verification of inventory, as per Cost Audit report for 2002-2003 and could not explain whether inputs used in or in relation to manufacture of final product except for submitting Cost Accountant's letter dated 16-5-2004 which is of very general nature while huge amount of credit Rs. 5.34 lakh was involved in this matter.

Regarding reliance placed upon the decision of the Tribunal at Delhi in the matter of Maruti Udyog Ltd. v. Commissioner of C. Ex., Delhi-III reported in , it is observed that in the reported judgement, shortage was very small (0.24 %) fraction of the inputs received. However, in the matter at hands, the percentage

was quite on the higher side (0.41%), as mentioned in the notice reply dated 09-02-2005. Taking into consideration Rule 7(4) of the Cenvat Credit Rules, 2002, the learned Joint Commissioner observed that the burden of proof regarding admissibility of CENVAT Credit lies upon the manufacture and which burden was not discharged by the assessee.

3. The assessee approached the Commissioner of Central Excise & Customs (Appeals), Aurangabad by way of an appeal. The Commissioner (Appeals) disposed of the appeal by his judgement and order dated 25-11-2005 who confirmed the demand and interest, but reduced the penalty to Rs. 25,000/- by observing thus:

However, I feel that this is not a case which warrants equal amount of penalty as there was no evidence/allegation of any clandestine removal or manipulation of any other kind, except the findings of the Cost Audit Report.

The assessee approached CESTAT which has set aside the order in its totality. The demand, the interest and the penalty all are quashed and set aside by its judgement and order dated 13-11-2006, which is under challenge.

4. We have admitted the appeal on following two substantial questions of law.

[I] Whether in the absence of any provision to ignore shortages within tolerance limit of the raw material on which, CENVAT Credit is claimed; authorities under CENVAT Act and Rules have power to ignore the shortages ?

[II] Whether Tribunal has interpreted Rule 7(4) of CENVAT Credit Rules, 2002 in correct perspective ?

We have heard learned Assistant Solicitor General Shri Alok Sharma, for the appellant. The respondent inspite of service is not before us, either through any authorized officer or a lawyer of their choice.

5. Rule 7 (4) of CENVAT Credit Rules, 2002 reads thus:

7 (4) The manufacturer of final products shall maintain proper records for the receipt, disposal, consumption and inventory of the inputs and capital goods in

which the relevant information regarding the value, duty paid, the person from whom the inputs or capital goods have been produced is recorded and the burden of proof regarding the admissibility of the CENVAT credit shall lie upon the manufacturer taking such credit.

The language of the Rule is plain and unambiguous. If the assessee claims entitlement to CENVAT Credit, it is the burden of proof upon the assessee to prove the admissibility of the CENVAT Credit. In the matter at hands and in the facts and circumstances of the case, the only manner in which the assessee could have justified the CENVAT Credit claim was by showing through the Books of Accounts or by any other piece of evidence that the inputs which were short as per Audit Report and were not utilized in the manufacture of final product. Having gone through the orders of all the authorities, there does not appear to be any such attempt on the part of the assessee. On the contrary, we are convinced that more reliance is upon claiming exemption, because CENVAT Credit claimed is upon the inputs which are a very small fraction of total inputs imported. We may only quote some part from the statement of Authorized Signatory of the assessee as referred in the order of the Joint Commissioner, which reads thus:..He confirmed that in the Cost Audit 2002-2003, shortage of raw materials of value of Rs. 33,42,161/- was shown and it involved CENVAT Credit of Rs. 5,34,746/-.

If this statement is taken into account, we are afraid, it was not open for the Commissioner (Appeals) to observe in paragraph No. 6 of his judgement that it was a case of alleged shortage of some items of inputs and excess of some other items of inputs, as revealed by the Cost Audit Report of the appellant for the period 2002-2003.

On going through the order of the Commissioner (Appeals), Cost Audit Report does not seem to be before the Authority, but the Authority seems to have relied upon a letter dated 17-10-2005 produced by the assessee at the time of personal hearing which was in fact a list submitted by the assessee of the items found excess and those found short.

We do not think that except reproduction of Rule 7 (4) of the CENVAT Credit Rules, 2002, any other material is required to record a finding in favour of the

Department that it is the burden of proof of the assessee to justify the CENVAT Credit availed. It is necessary to refer the orders of the Joint Commissioner as also the Commissioner (Appeals) because they have applied Rule 7 (4) in correct perspective. In view of failure on the part of the assessee to account for utilization of the inputs which were short and upon which CENVAT Credit was claimed, but were not accounted in the Audit Report as utilized in the production, the two lower authorities have decided the matter against the assessee, and therefore, those authorities cannot be said to have read Rule 7 (4) in an incorrect manner.

6. So far as the order of CESTAT is concerned, it has mainly relied upon the decision of the Tribunal at Delhi in the matter of Maruti Udyog Ltd. v. Commissioner of C. Ex. Delhi-III reported in . We must state here itself that the decision of the Tribunal is certainly not binding upon us and it is a question as to whether we should approve the view taken by Delhi Tribunal in Maruti Udyog case and followed by the Tribunal in the impugned judgement. It is observed by the Tribunal at Delhi in paragraph No. 7 in its judgement in the case of Maruti Udyog as under.

The appellants have a huge and complex accounting problem. It is beyond manual tally. The appellants have put in place sophisticated computer based accounting systems to ensure accuracy and efficiency. The evidence on record does not indicate any diversion of inputs in contravention of rules relating to utilisation of inputs. The demand is merely based on the shortages detected during physical tallying, that too without taking into account the excesses noticed. Since there is no evidence, that the excesses are not the result of clandestine receipt of inputs, the same view is required to be taken in regard to shortages also, that the shortages are not the result of any clandestine or unauthorised utilisation of the inputs.

Probably in order to rely on these observations, the letter from Cost Auditor Shri Dhananjay V. Joshi was produced, which was practically in the same terms as the letter of Auditor namely Price Water House in the reported judgement and paragraphs No. 5.3 to 5.6 of which are reproduced in paragraph No. 2 of the reported judgement. From the observations of the Tribunal, it is evident that the

Tribunal has not placed reliance upon any legal provision, either from the Act or from the Rule, while exonerating the assessee from the liability to pay duty by reversing the CENVAT Credit wrongly claimed. When there is no statutory foundation for such exemption, with due respect, we are unable to agree with the view taken by the Tribunal. It seems to be a sympathetic view by taking into consideration that it is a huge plant with huge turnover and inspite of huge and complex accounting system, there are bound to be some problems and some errors. With due respect, the Tribunal did not consider the other side of the coin. The Department does not function as a supervisor to ensure that every input is used or not used in the manufacture of final product is properly recorded in the accounts and the Department wholly relies upon the Books of Accounts maintained by the assessee for the purpose of finding out as to whether correct CENVAT Credit is claimed and whether correct duty is paid by reversing the CENVAT Credit to which they were not entitled. Ultimately, the amount recovered has to go to the Public Exchequer. Without accusing the Department in the present case, we cannot avoid considering a probability that the Books of Accounts being constantly under the control of the assessee, it is easier for assessee to play mischief, if assessee so desires.

In the present matter, of course, we do not find any mis-statement or suppression because the Department has relied upon the Accounts of the assessee for finding out shortage and assessee has not even suppressed that the CENVAT Credit is not reversed to the extent of shortage, and we are of the view that when the Commissioner (Appeals) had arrived at a conclusion that there was no clandestine removal or manipulation, suppression or mis-statement or contravention of specified Rule, there ought not to have been imposition of any penalty, much less the reduced penalty.

We find it difficult to approve the view taken by the Tribunal at Delhi in Maruti Udyog case, mainly because such a view which can be described as only sympathetic view does not have any basis of any statutory provision.

7. The appeal is, therefore, partly allowed. The impugned judgement and order of CESTAT is quashed and set aside. We restore the order of the Joint

Commissioner, Central Excise & Customs, Aurangabad, to the extent of confirmation of demand notice and interest under Section 11AB of the [Central Excise Act, 1944](#). We hereby clarify that having arrived at a conclusion that there was no suppression or any mis-statement on the part of the assessee, we are not inclined to maintain any penalty under Section 11AC of the Act.

The appeal is accordingly disposed of.

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