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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Tamil Nadu

Decided On : Mar-10-2005

Reported in : (2005)(100)ECC561

Judge : Author: P Chacko

Appellant : Cce and Advance Detergent Ltd.

Respondent : Advance Detergent Ltd. and Cce

Judgement :

1. M/s. Advance Detergents Ltd., (assessee) were engaged in the manufacture of Linear Alkyl Benzene Sulphonic Acid (LABSA, for short), for which 98% Sulphuric Acid and Linear Alkyl Benzene were used as inputs. What was called 'Spent Sulphuric Acid (SS Acid, for short) [78% to 80% concentration] emerged at the end of the process of manufacture and the same was cleared without payment of duty. Show-cause notices were issued to the assessee demanding reversal of Modvat credit on account of SS Acid, alleged to be a marketable and excisable product, having been cleared without payment of duty. This demand was resisted by the assessee who contended that SS Acid being a waste was covered by the provisions of Rule 57D which did not require reversal of Modvat credit or payment of equivalent amount of duty. The original authority confirmed the demand against the assessee. But the first appellate authority set aside the demand, holding that SS Acid was a by-product attracting Rule 57D and that there was no mechanism for recovery of 8% of its sale price under Rule 57CC. The lower appellate authority relied on the following decisions:--Jaydee Agro Chemicals Ltd. v. CCE, Jaipur,

1996 (84) ELT 354 (Tri) In Appeal Nos. E/777 to 784/2003, the Revenue is in challenge against the view taken by the lower appellate authority that there was no machinery in the Central Excise Rules for recovery of 8% of the sale price of the exempted product under Rule 57CC or Rule 57AD (2). It is contended that as LABSA was cleared on payment of duty while SS Acid was cleared without payment of duty, an amount equivalent to input duty credit relatable to SS Acid or an amount equal to 8% of the price of SS Acid was payable by the assessee. In the assessee's Appeal Nos. 799 & 800 /2004, it is stated that they had deposited, under protest, 8% of the price of SS Acid and are entitled to refund of this amount. It is contended that the refund claim is not hit by the bar of unjust enrichment as the above payment was made under protest.

2. After hearing both sides and considering their submissions, we find that the question is whether the assessee was entitled to avail Modvat credit of the duty paid on the entire quantity of Sulphuric Acid used in the manufacture of LABSA. It is evident from the facts of the case that the assessee paid 8% of the price of SS Acid which was cleared without payment of duty during the period of dispute. They did so in terms of Rule 57CC/Rule 57AD (2) of the Central Excise Rules, 1944, as they had cleared their product (LABSA) on payment of duty and their by-product (SS Acid) without payment of duty during the said period. In the Revenue's appeals, apparently, the appellant's case is that 8% of the price of SS Acid is less than the input duty credit relatable to the quantity of this by-product and, therefore, the differential credit should be reversed by the assessee. In the assessee's appeals, we find a challenge against non-refund of the 8% of the price of SS Acid deposited by them, on the limited ground that the refund claim was not hit by the bar of unjust enrichment on account of the above amount having been paid under protest.

3. Admittedly, LABSA was a dutiable product and the same was cleared on payment of duty by the assessee during the material period. Insofar as the SS Acid is concerned, it is now settled that it is an excisable by-product emerging in the process of manufacture of excisable final product and, therefore, input duty credit is not deniable in relation to SS Acid vide the Tribunal's Larger Bench decision in Collector v. Keti Chemicals, 1999 (113) ELT 689 and the Allahabad

High Court's decision in Varuna Sulphonators (supra). It is relevant in this context to mention that the High Court's decision in Varuna Sulphonators (supra) was followed by the Tribunal in Southern Petrochemical Industries v. CCE, Madras, 2002 (148) ELT 1012 (Tri-Chennai) and that the Civil Appeal filed by M/s. Southern Petrochemical Industries against the Tribunal's decision was dismissed by the Supreme Court vide 2003 (152) ELT A 96 (SC). When both the main product and the by-product were dutiable, the assessee was eligible for input duty credit on the entire quantity of 98% Sulphuric Acid and it was not open to the department to ask them to reverse any part of such credit already taken. We, therefore, do not find any merit in the Revenue's appeals, which are dismissed.

4. The assessee had paid 8% of the price of SS Acid cleared without payment of duty during the period of dispute. They have claimed that they made such payment under protest. Their claim for refund of the duty was rejected by the lower appellate authority after finding that the party had not established that they had not passed on the incidence of duty to any other person. This decision of the Commissioner (Appeals) has been challenged by the assessee on the ground that, where the duty was paid under protest, the bar of unjust enrichment was not applicable. This ground, which has been reiterated by learned counsel, cannot be sustained inasmuch as it has been settled by the Supreme Court that the factum of duty having been paid under protest is not relevant to applicability of the doctrine of unjust enrichment. We, therefore, do not find any merit in the assessee's appeals either.

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