Hindustan Copper Ltd. Vs. C.C.E.

Hindustan Copper Ltd. Vs. C.C.E.

SooperKanoon Citation : sooperkanoon.com/42465

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Apr-20-2006

Reported in : (2006)(110)ECC115

Judge : M Ravindran, N T C.N.B.

Appellant : Hindustan Copper Ltd.

Respondent : C.C.E.

Judgement :

1. True to name, the appellant is a leading manufacturer of copper. The said manufacture is from copper concentrate (input). Basically, the process of manufacture is smelting the concentrate in a smelter. During that process of smelting, sulphur dioxide gets released. That di-oxide is further converted by the appellant into sulphuric acid (by-product).

Part of sulphuric acid so produced is removed on payment of central excise duty and the remaining is supplied to industrial manufacturers (without payment of duty) under Chapter X procedure. While this is the disposal of the sulphuric acid (by-product), copper produced is smelted into copper cathode (final product) and is cleared on payment of duty.

The appellant had taken modvat credit on copper concentrate and was using that credit for the purpose of discharging central excise duty on copper cathode as well as sulphuric acid.

2. Under the impugned order, it has been held that Rule 57CC is attracted in regard to supply of sulphuric acid under Chapter X procedure since the supplies are duty free and the appellant is liable to pay 8% of the price of sulphuric acid so supplied in terms of Rule 57CG(1), This finding has been reached by the adjudicating authority on the basis that the appellant manufactures dutiable and exempted final products - copper cathode being dutiable and sulphuric acid being exempt - and Rule 57CC requires such a manufacturer to pay 8% of the price of the exempt final product.

3. The contention of the appellant is that the entire copper concentrate (input) is used in the manufacture of only one dutiable final product, copper cathode, and Rule 57CC is not attracted.

According to the appellant, the incidental release of sulphur dioxide during the process of manufacture of copper cathode does not change the fact that the input received is totally used in the manufacture of one of final product, copper cathode. It is being contented that the emergence of a by-product is not a case where part of the input gets used in the manufacture of another final (exempt) product. Learned Counsel for the appellant has relied on the judgment of the Apex Court in the case of Swadeshi Polytex Ltd. v. C.C.E. 1988 (38) ELT 794 (SC) in their support.

4. Learned Counsel has also a submission that Modvat Rules make it clear that the emergence of refuse or by-product is no ground for denying credit on that portion of the input which is contained is attributable to the quantity of refuse or by-product. It is being pointed out that this position is clear from the Rule 57D of Central Excise Rules.

5. We may first note the legal position. Rule 57C states that no "No credit of the specified duty shall be allowed on such quantity of inputs which is used in the manufacture of final products which are exempt from the whole of the duty of excise leviable thereon or are chargeable to nil rate of duty." In the present case, revenue authorities are treating clearance of sulphuric acid under chapter X procedure as clearance of exempt final product. Demand has been made in terms of Rule 57CC(1) pursuant to this finding that final product is exempt. That Rule

states that "Where a manufacturer is engaged in the manufacture of any final product which is chargeable to duty as well as in any other final product which is exempt from the whole of the duty of excise leviable thereon or is chargetable to nil rate of duty and the manufacturer takes credit of the specified duty on any inputs which is used or ordinarily used in or in relation to the manufacture of both the aforesaid categories of final products..., the manufacturer shall,... pay an amount equal to 8% of the price... of the second category of final product....

6. The submission of the learned Counsel for the appellant is that the very issue as to whether a part of the input is being used in the manufacture of a by-product came up for consideration before the Apex Court in an identical case [Swadeshi Polytex Ltd. v. C.C.E. 1988 (38) ELT 794 (SC)]. and the Supreme Court ruled that no portion of the input can be held to have been used in the manufacture of a by - product.

Specific reliance is being placed on the following observations in that judgment: 20. On an analysis and comparison of aforesaid, it is clear that the clarification in the form of trade notice issued by the Pune Collectorate in respect of Rule 56A was as much applicable to that rule as to Notification No. 201/79 in the premises, it is clear that the Tribunal should have held that even though a part of the ethylene glycol was contained in the byproduct methanol, yet the credit of duty could not be reduced to the extent of the ethylene glycol contained in the methanol as ineligible. It is true that when in a fiscal provision, if benefit of exemption is to be considered, this should be strictly considered. But the strictness of the construction of exemption notification does not mean that the full effect to the exemption notification should not be given by any circuitous process of interpretation. After all exemption notifications are meant to be implemented and trade notices in these matters clarify the stand of the Government for the trade. It is clear, therefore, that the Tribunal failed to interpret the words of the exemption notification No. 201/79 properly and fully. The said notification exempted all excisable goods on which the duty of excise was leviable and in the manufacture of which any goods falling under Tariff Item 68 (i.e. inputs) had been used from so much of the duty of excise leviable thereon as was equivalent to the duty of excise, already paid on the inputs. It is clear, however, that ethylene glycol was used in the manufacture of polyester fibre.

It appears that methanol arises as a part and parcel of the chemical reaction during the process of manufacture when ethylene glycol interacts with DMT to produce polyester fibre. It is not possible to use a lesser quantum of the ethylene glycol to prevent methanol from arising for producing a certain quantity of polyester fibre. Thus, the quantity of ethylene glycol required to produce a certain quantum of polyester fibre is determined by the chemical reaction.

It may be mentioned herein that it is not as if the appellants have used excess ethylene glycol wantedly to produce the methanol. It is clear that the appellants are not engaged in the production of methanol but in the production of polyester fibre. That position is undisputed. Therefore, it appears that the Tribunal erred when it held that the appellants were not entitled to a part of the credit of duty since ethylene glycol when it interacts with DMT also gives rise to methanol. This construction would frustrate the object of exemption if something which evidently arises out of the interaction. Even prior to amendment to notification No. 201/79 with effect from 11-4-87, the only situation where the credit of the duty paid on the inputs could be denied was only where the final products were wholly exempt from the duty of excise or chargeable to nil rate of duty. In the present case, the excisable goods, namely, polyester fibre were not wholly exempt from duty nor chargeable to nil rate of duty. It cannot be read in the notification that the notification would not be available in case non-excisable goods arise during the course of manufacture. In fact, the Tribunal seems to have erred in not bearing in mind that exemption notification was pressed in service in respect of polyester fibre which is excisable goods and not in respect of methanol which arises as a by-product as a part and parcel of chemical reaction. It appears further on a comparison of the Rule 56A and the Notifn. No. 201/79 that these deal with the identical situation.

The submission of the learned Counsel is that the observation of the Apex Court in regard to ethylene glycol as an input in the manufacture of polyester fibre, despite the arising of methanol as a by-product, is equally applicable in the appellant's case where sulphur di-oxide emerges as a by-product during the manufacture of copper. It is being pointed out that no portion of copper concentrate could be attributed as used in the production of sulphur di-oxide. The emphasis is that the same quantity of copper concentrate would be used for obtaining a given quantity of copper, irrespective of whether sulphur di-oxide is harvested or released into air. Inevitably, sulphur di-oxide arises as a by-product. It is the learned Counsel's submission that when the norm between input and final product is not affected by the emergence of by-product, it is not permissible to treat a portion of the input as being used in the manufacture of the by-product or to treat the by-product as another final product. According to the ld. counsel in the present case, there are no two final products. The only final product is copper cathode. The by-product does not enter the equation (between input consumed and final product manufactured).

7. As against the above submission of the learned Counsel, the learned SDR has contended that this is a case where specified product namely, sulphuric acid is being cleared without payment of duty and since it is being produced from modvated input, lower authorities were right in invoking Rule 57CC and in demanding payment at the rate of 8%. He has relied on the decision of this Tribunal in the case of Binani Zinc Ltd. v. C.C.E., Cochin andIndian Iron & Steel Co. Ltd. v. C.C.E., Bolpur 8. It is to be firstly noted that Rule 57CC(1) is attracted only where two final products, one dutiable and the other non-dutiable are produced from the same modvated input. Similarly, occasion for varying Modvat credit taken on inputs arises under Rule 57C only where input is used in the manufacture of exempted final product. The position of by-product in the proforma credit scheme came up for consideration before the Apex Court in the case of Swadeshi Polytex Ltd. relied upon by the appellant. In that case, the Apex Court ruled that the coming into existence of byproduct does not in any way affect the proforma credit scheme. Frame work of modvat credit and proforma credit are the same and modvat scheme is the Successor of proforma credit scheme.

Therefore, the ruling of the Apex Court in relation to the interpretation of proforma credit rules binds the understanding of modvat provision also. Further, the appellant is right in its contention that provisions of Rules 57C and Rule 57CC are to be read, understood and construed along with the provision of Rule 57D. Rule

57D makes it clear that credit of duty is not to be denied or varied on the ground that waste, refuse or a by-product has arisen and they are exempt.

9. In the present case, there can be no dispute that sulphuric acid is a by-product which emerges willy-nilly in the smelting of copper concentrate in the manufacture of copper cathode. This is a gas let off by copper concentrate. That cannot be prevented. A by-product by its very nature is not the result of deliberate manufacture. It arrives, welcome or not. A by-product does not enter the equation between input and final product. This position remains settled by the judgment of the Hon'ble Supreme Court in the case of Swadeshi Polytex Ltd. The ratio of the judgment of the Supreme Court applies to the present case also. No part of the input (copper concentrate) can be taken as going into the production of any final product other than copper cathode. It is also noted that in an identical case [Birla Copper v. C.C.E., Vadodara 2004 (117) ECR 1103] in relation to the same namely, by-product, sulphuric acid, emerging in the manufacture of copper cathode, this Tribunal held that demand of 8% is not sustainable even when supply of sulphuric acid is under Chapter X procedure.

10. In view of the foregoing, the appeal is allowed after setting aside the impugned order. The appellant shall be entitled to consequential relief.