Fdc Ltd. Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Apr-24-1991

Reported in : (1991)(55)ELT601Tri(Mum.)bai

Appellant : Fdc Ltd.

Respondent : Collector of Central Excise

Judgement :
1. Both the aforesaid appeals are against the same order passed by the Collector of Central Excise (Appeals) bearing No. SKM-1923/89 B-II dated 19-9-1989.

The appellants are manufacturing P. or P. Medicaments falling under Chapter sub-heading No. 3003.19 of Central Excise Tariff. They are working under the modvat scheme in respect of the inputs permitted under the scheme. The disputed input is aluminium foil, which they brought under modvat scheme and sent the aluminium foil, under Rule 57F outside to job workers for conversion into sachets for packing of medicines. These aluminium foils at the time of receipt in their factory are laminated and printed with the details of the medicines and also bear the name of the manufacturer directions for use etc.

These foils, on their receipt in their factory were entered into RG 23 register and credit taken, thereafter, they were sent for converstion into sachets by the outside job workers by virtue of the permission granted under Rule 57F. It was alleged by the Asstt.

Collector that modvat rules do not permit packaging materials, which are not ready for use for packing the final product. In this view, he held that only the sachets which are ready to use for packing the medicaments should have been declared as input in the declaration filed under Rule 57G. The Assessee has also not paid duty on the sachets because of the permission granted under Rule 57F. Hence, the modvat credit taken on printed aluminium foils is not entitled to them. In the adjudication proceedings held by the Asstt. Collector, he confirmed the show cause notice issued and directed the riversal of the credit amounting to Rs. 28,71,946.94. When the matter was taken up in appeal by the assessee, the Collector (Appeals) allowed the assessee's appeal on the ground of time bar but dismissed their plea that aluminium foils is packaging materials in respect of which credit is admissible. In other words, the Collector (Appeals) confirmed the dbmands for a period of six months from the relevant date and dismissed their appeal on merits. The assessee have come in appeal against the order of the Collector (Appeals) dismissing their appeal on merits and the Department have come up in appeal against the same order of the Collector (Appeals) allowing the assessee's appeal on the ground of time bar.

3. Shri Hidayatullah, the Ld. Sr. advocate, after stating the facts of the case, pointed out that while the Asstt. Collector alleged that aluminium foils were not in ready to use condition as packaging materials and Rule 57F permitted only such packaging materials, which were ready to use and hence disallowed the modvat credit, the Collector (Appeals) held that the facility under Rule 57F(2) was provided only for sending the inputs outside as such or after the inputs had been partially processed during the course of manufacture of final products.

The said rule does not permit removal of inputs of packing matierial, viz. foils for sachets and the assessee can declare sachets as final product and avail of the facility under Rule 57F(2) for job work and pay duty on sachets afterwards. In this view, he confirmed the demand limited to a period of six months. The arguments of Shri Hidayatullah could be briefly summed up as below : The appellants filed the declaration showing the inputs viz. aluminium foils as packing materials. They applied for permission to send this material outside under Rule 57F(2) for converting into sachets and this permission was granted on 28-6-1986; only after 2 years on 7-4-1988, an objection was raised that credit could not be taken on the aluminium foil which were not directly used in the packing of the final product and the packaging materials referred to in Rule 57F could only be those, which were ready to use as packaging materials. This contention has been upheld by the Asstt. Collector wrongly. Rule 57A clearly specifies that the inputs include packaging materials. It is not restricted to only ready to use packaging materials. Packaging material has a wider connotation and meaning. In this context, he referred to the meaning of package and packaging in Shorter Oxford Dictionary and also the meaning given in Randon House Dictionary. If the wordings used in Rule 57A is only a package or packaging, the Asstt. Collector's interpretation could be sustainable. But the wordings used in Rule 57A refers to packaging materials which could mean materials used for bringing into existence a package or packaging. Aluminium foils printed and embossed with details which are only of particulars use for the appellants' final product, medicaments, are nothing but packaging materials used for the purpose of packaging of the medicaments.

However, these printed foils have to be converted into sachets for packaging the medicaments and the medicaments cannot be put in the foils in the condition in which they are received and supplied to the customers. Hence conversion of a sachets does not and should not be construed to mean that the aluminium foils ceased to be packaging materials. When there is no specific requirement that packaging material should be brought only in a ready to use condition as laid down in the Rule, the Asstt. Collector has traversed beyond the scope of the rules and his findings are not legally tenable. In the order of the Collector (Appeals) he contended that Rule 57F(2) contemplates sending of inputs as such or after partial manufacture to outside job workers. In this case, aluminium foils are also included within the scope of inputs, since they are identifiable as packaging materials for the medicaments. He also showed the samples of the printed laminated foils to substantiate that these foils are used only for the packing of the medicaments and that too manufactured by the appellants. Hence, when it is identified that these are packaging materials for medicament, they would get covered by the term 'inputs' as per the explanation to Rule 57A, which includes packaging materials. When the facility of removal of inputs as such, is provided for under Rule 57F, the Collector (Appeals) is not justified in taking the view that this facility could be availed of only in respect of inputs, which go into the manufacture of sachets and not in respect of the final product medicaments. He also stated that in the case of P&P medicaments manufacture also includes packaging, labelling etc. and these are also essential requirements for marketing any medicament as per the Drugs Control Regulations. In view of this, when packaging materials are specifically included as input and the present goods are specifically established to be the packaging materials for the final product viz.

medicaments, the Collector (Appeals) is not justified in holding that permission under Rule 57F(2) is available only in respect of sachets and not for the final product medicaments.

4. On the ground of time bar, he justified the order by referring to the judgment of the Supreme Court in the case of J.K. Spinning & Weaving Milts -1987 (32) ELT 234 (SC) which judgment was not cited and considered by the Gujarat High Court in the case of Torrent Laboratories Pvt. Ltd. reported in 1991 (55) ELT 25 (Guj.). When the Supreme Court's judgment is available on the question of applicability of Section 11A, even in an enactment, which does not provide for time limit, and when this judgment has not been cited and considered by the Gujarat High Court, the Tribunal is not bound to follow the ratio of the Gujarat High Court's judgment. The Tribunal is at liberty to follow the ratio.of the decision of the Supreme Court in J.K. Spinning & Wvg.

Mills supra.

5. Shri Mondal, the Ld. SDR for the Department referred to the Board's clarification reported in 1991 (32) ECR part II page 25C and advanced his arguments in support of the clarification given by the Board. He contended that Rule 57A no doubt, refers to packaging materials. Modvat Scheme contemplates receipt of such materials and usage of the same in the final product as such. Here, the admitted position is that they have converted the foils into sachets by the ouside job workers and these sachets are also a distinct commodity attracting separate excise levy. Hence, the aluminium foils brought in by the assessee could only be said to have been used in or in relation to the manufacture of the final product viz. sachets. It was open to them to send the aluminium foils under Rule 57F for

conversion into sachets and after payment of duly on sachets could take credit of duty paid on sachets for the packaging of the medicaments. In a case, where a distinct product classifiable under a separate Tariff heading or sub heading comes into existence on account of coversion of aluminium foils, it cannot be construed that the aluminium foils have been used in or in relation to the manufacture of medicaments but to be construed as used only in or in relation to the manufacture of sachets. In this context, he relied on the judgment of the South Regional Bench in the case of Ponds (I) Ltd. -1988 (38) ELT 351 (Tribunal). On the question of limitation, he contended that the Supreme Court judgment, in the case of J.K. Spinning & Wvg. Mills was in the context of Section 51 of the Finance Act giving retrospective validity with regard to the levy and collection of duty on goods manufactured and captively consumed. Since Section 51 of the Finance Act did not provide for specific time limit, the Supreme Court held that it should be read in conjunction with Section 11A, mainly because of the fact that Section 11A deals with short levy, non levy etc. and that section cannot be overlooked. However, in the case of Torrent Laboratories Pvt. Ltd. the Gujarat High Court has held that modvat scheme is an independent and self contained scheme and has given a finding directly on the issue. Section HA could not be attracted for interpreting the provisions of Rule 571 prior to amendment and no separate time limit is prescribed. It only held that a show cause notice may have to be issued within a reasonable period and in this case the show cause notice has been issued within a period of 1/a years and it could be considered to be reasonable.

6. Shri Nankani, in reply stated that the reasonable period has to be construed in the context of the Supreme Court's judgment in the case of J.K. Spinning & Wvg. Mills where it has been held that Section 11A provides for the reasonable time limit. Moreover, when the Government itself have considered six months as the normal period of limitation and 5 years in the case of wilful misrepresentation, suppression etc.

that has to be construed to be the reasonable period, when they amended the Rule 57F. He also sought to rely on the judgment of the East Regional Bench in the case of Rasoi reported in 1990 (49) ELT 522 (Tri.), wherein, the East Regional Bench has construed tin plates required for the manufacture of metal containers for packing vagetable product, as packaging material. He also referred to this Bench's order No. 1764/90/WRB dated 22-10-1990 and contended that the issue has been looked into correctly by this Bench by interpreting the term 'packaging materials', referred to in the explanation to Rule 57A. Once it is established that the item brought in is a packaging materials, it is to be given the benefit of modvat credit. He also sought to distinguish the decision of the South Regional Bench in the case of Ponds (I) Ltd. (supra) by pointing out that there, modvat credit was claimed in respect of plastic granules, which were converted into containers by outside job workers and such granules cannot be equated with aluminium printed foils of the type clearly identifiable as packaging materials for the specific item and that they could be used as packaging materials only for medicaments and that too by the particular manufacturer. He, therefore, stated that the decision of the South Regional Bench cited by the Ld. SDR would not be applicable.

7. After hearing both the sides, we identify the following issues for purpose of decision in both the appeals: (i) Whether the item 'packaging material' referred to in the explanation to Rule 57A could be restricted only to boxes, packets, sachets, etc. which are in ready to use condition and not to item 'aluminium foils' printed and laminated with particulars of the packed product; (ii) whether Rule 57F(2) could be applied only in the case of inputs in the nature of raw materials or components sent out for conversion of the final product viz. medicaments or in this case rule 57F(2) would be applied for sending of aluminium foils only for the manufacture of sachets; and (iii) whether the demand is time barred for the period extending beyond six months.

8. The undisputed facts are that the appellants are bringing printed, laminated aluminium foils on payment of duty in respect of which credit has been taken. These laminated printed aluminium foils bear description of the final product and details regarding the manufacturer's name, direction for use etc. and hence, from these details, it is clear that they are meant for packing a specific final product. The printed aluminium foils were not converted into sachets in the factory and the appellants sent the same outside for conversion on job work and the permission was granted by the Department under Rule 57F(2); but subsequently withdrawn. The demand has been issued during the period, when Rule 57-1 did not provide

for specific time limit and the demand traverses beyond the period of six months. With this undisputed factual position, we proceed to consider the issues in greater detail as below : 9. We had a careful study of the clarification given by the Board referred to by the Ld. SDR, Shri Mondal. The relevant extracts are reproduced below: "The matter has been examined by the Board. It is observed that Rule 57A allows Modvat credit for 'packaging materials' and not on raw materials for making such packaging materials. Packaging materials are ready to use articles such as containers, boxes, cartons, bottles etc. Therefore modvat credit will be admissible for the duty paid on such ready to use packaging materials but not on the raw materials such as plastic granules, steel sheets/strips etc.) used for making packaging materials, Raw materials like plastic granules or steel sheets/strips are general purpose articles which can be put to various uses, one of which is making of packaging materials.

These raw materials by themselves are not recognisable as packaging materials. Board has further observed that this controversy has cropped up only with respect to packaging materials like plastic containers and cardboard cartons (which are fully exempt) either because of the fact that they are manufactured in the small scale sector or are specifically exempted under some exemption notification. Since the user of such duty free packaging materials are unable to get the modvat credit in respect of the exempt ready to use packing article themselves, they are wanting to have the modvat credit for duty paid on raw materials for making such packaging materials by bringing such raw materials in to their factory, taking credit of the duty paid on such raw materials, thereafter sending these credit paid raw materials to job workers under Rule 57F(2) for converting them into ready to use packaging articles and bring such packaging materials back into their factory.

This demand of the assessees is not admissible, as Rule 57A does not allow modvat credit in respect of raw materials for packaging materials." 10. From the above, it is clear that the Board had not considered the meaning of the packaging materials as indicated in Rule 57A; but have construed that modvat credit would be admissible only for the duty paid on such ready to use packaging materials but not on the raw materials such as Plasitc granules, steel sheets/strips etc., used for making packaging materials. The Board had also observed that this controversy has cropped up only with respect to packaging materials like plastic containers and cardboard cartons either because of the fact that they are manufactured in the small scale sector or are specifically exempted under some exemption notification. In that context, they have observed that the demand of the assessee for bringing the raw materials for packaging materials and sending them to outside under Rule 57F(2) is not admissible because Rule 57 A does not allow modvat credit in respect of raw materials for packaging materials. (emphasis supplied).

In the case before us, laminated printed aluminium foils is clearly identifiable as a packaging material for the final product 'medicaments'. This is evident from the details of the particulars printed on these foils and they can be used only for the packing of the medicaments and that too manufactured by the present appellants. Hence, it cannot be contended that such printed aluminium foils which ar clearly identifiable as packaging materials for packing the final product 'medicaments' are only raw materials for sachets. Sachets are required to be meant for putting the medicaments and the basis packaging materials is aluminium foils. Hence it comes squarely within the purview of the term 'packaging materials. We have also had an occasion to consider a similar issue in the case of Parle Products Pvt.

Ltd. The relevant portion of the judgment in the aforesaid case is reproduced below: "The appellants contend that they are bringing ready to use packaging materials from outside after payment of duty on such printed/laminated materials and credit of duty paid on this ready to use packaging materials is availed of by them. Hence they plead that similar benefit should be extended, even if such ready to use packaging materials are made by themselves. We would like to look at this issue from a different angle. Rule 57A refers specifically to packaging materials. When the "ready to use packaging materials" are received by the appellants after printing and lamination, no-one can deny that they are not packaging materials. Hence credit has to be allowed on the duty paid on such packaging materials. However, when they receive plain aluminium foil, paper, printing ink and other chemicals for lamination, among the aforesaid items, only aluminium foil and paper could be identified and construed as packaging materials as per the explanation to Rule 57A. The other materials viz. printing ink and chemicals used for lamination cannot be construed as packaging materials by any stretch of imagination. We are required to interpret the term 'packaging material' as an input for the final product and not the inputs going to make the packaging material itself. In this view of the matter, we hold that the appellants are entitled to modvat credit only in respect of plain paper and aluminium foil treating them as 'packaging materials' being the input for the final product as per explanation to Rule 57A. In respect of the other inputs such as printing ink and other chemicals used for lamination, they are not eligible for modvat credit being not identifiable as packaging materials. Accordingly, we direct the Asstt. Collector to restrict the demand only to the extent of modvat credit involved on inputs like printing ink and other substances used for lamination and printing but allowing the modvat benefit in respect of duty on aluminium foils and paper." 11. We have no reason to take a different view now especially when the material received by them is printed aluminium foils, which could be clearly identifiable as the packaging materials for the medicaments manufactured by the assessee and cannot be used as otherwise than as the packaging materials. Hence, even in the context of the Board's clarification, we find that in the case of the present appellants, the benefit is required to be allowed. We also had a look at the decision of the South Regional Bench in the case of Ponds' India Ltd. cited by the Ld. SDR. In that case, the input considered was HDPE granules, which were used for conversion into jars and bottles for talcum powder, cream etc.

The Department rejected the eligibility of these granules as packaging materials and also refused permission for removal of such granules for manufacture of containers under Rule 57F(2), However, in that judgment, they had no occasion to look into the meaning of the packaging materials referred to in Rule 57A. The term 'packaging materials' has a wider connotation and meaning. This is also evident from the fact that even plywood for tea chests are recognised as packaging materials'but are sought to be specifically excluded, while including the other packaging materials. Hence what is required to be looked into is, whether the material received could be known to have its normal use as packaging materials and is also established to be used as packaging materials, which are permitted under Rule 57A. If the intention was only to permit ready to use containers such as boxes or bottles, then the term used would have been 'package or container'. In the absence of any such restrictive meaning provided, the term 'packaging material' has to be interpreted as such and cannot be interpreted in the restricted manner. In the case of Ponds' India Ltd. the disputed input was plastic granules, which cannot be identified normally as packaging materials. They are plastic granules, which are required for the manufacture of any plastic articles. Hence, they are only raw-materials for manufacture of plastic articles. In the circumstances, when such raw-materials for plastic articles are claimed the benefit of modvat credit as packaging materials, it cannot be brought within the purview of the meaning of 'packaging materials'. In the case before us, aluminium foils printed are clearly identifiable as packaging materials for packing the assessee's final product. Hence, the case of Ponds' India Ltd. is clearly distinguishable. Moreover, we find that the Board's clarification would affect only those, who gets the basic ingredients for preparing packing material and send them to outside for conversion into packing material on job work basis. The clarification is silent about those who gets the basic packaging materials and convert them within the same factory of production of the final product. In any case, we are of the view that the test that should be applied is, whether the material is identifiable as a packaging material and its normal usage is for packing purposes and it has been brought only for the packaging purposes. If this test is satisfied, neither the Rule 57A could be said to deny the benefit nor the Rule 57F(2) could be refused in such cases. Moreover, we find considerable force in the arguments of S/Shri Hidayatulla and Nankani that packing and labelling is construed to be manufacture of the final product.

Hence, aluminium foils sent out for conversion into sachets for packing the medicaments would come within the purview of manufacture of the final product viz. medicaments. In this view of the matter, Shri Mondal's arguments based on the Board's circular does not pursuade us to take a different view than the one already taken by us in our Order No. 1764/90/WRB dated 22-10-1990 in the case of Parle Products Pvt.

Ltd., Hence, we allow the appeal of the assessee on merits. In the circumstances, it would not be necessary for us to go into the merits of the Department's appeal on the ground of time-bar. Hence, we do not propose to consider the issue in greater detail for purposes of disposing of this appeal. We would wait for another opportunity for going into the contentious issues raised on time-bar aspect. Since the appeal of the assessee is allowed on merits, the entire demand for reversal of the modvat credit is set aside on merits.