Union of IndiA. Vs. Sharp Menthol India Ltd, and anr.

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SooperKanoon Citation : sooperkanoon.com/913344

Court : Mumbai

Decided On : Apr-06-2011

Judge : Mrs. R.S. Dalvi; J.P. Devadhar, Jj.

Acts : Central Excise Act, 1944 - Section 11BB, 35EE ; Additional Duties of Excise (Textile and Textile Articles) Act, 1978 - Section 3 ;

Appeal No. : WRIT PETITION NO.1850 OF 2011.

Appellant : Union of IndiA.

Respondent : Sharp Menthol India Ltd, and anr.

Advocate for Def. : Mr.V.Sridharan; Mr.Prakash Shah; Mr.Sanjay Agarwal, Advs.

Advocate for Pet/Ap. : Mr. Pradeep Jetly, Adv.

Judgement :

1) This petition is filed by the Commissioner of Central Excise, Raigad to challenge the order passed by the Joint Secretary to the Government of India on 21/1/2011 whereby the stay application filed by the Commissioner of Central Excise seeking stay of the order passed by the Commissioner of Central Excise (A) on 14/9/2010 till the disposal of the Revision Application, has been rejected. By order dated 14/9/2010, the Commissioner of Central Excise (A) had held that the respondent No.1 ('the assessee' for short) is entitled to claim rebate of duty paid on export of peppermint oil by debiting the credit of duty paid on inputs used in the manufacture of final products. In the Writ Petition No.8068 of 2010 filed by the assessee

seeking implementation of the order of Commissioner (A) dated 14/9/2010, this Court directed the Commissioner to deposit the rebate claim allowed by the Commissioner (A) and accordingly, the Commissioner has deposited in this Court Rs. 38,03,89,634/- towards the rebate claim.

2) Although the Commissioner is aggrieved by the order of the revisional authority in declining to stay the order of the Commissioner (A) till the revision application is heard finally, counsel on both sides urged before us that the matter be heard on merits. Accordingly, counsel on both sides have been heard extensively on the question as to whether on merits the assessee is entitled to claim rebate of duty paid on peppermint oil by adjusting the input credit availed on the inputs used in the manufacture of menthol crystals / peppermint oil. 3) The relevant facts are that the assessee is engaged in the manufacture and export of menthol crystals BP/USP and flavouring materials such as peppermint oil by using menthol (liquid) / de- mentholised oil as the raw materials. The assessee has its manufacturing units at several places including units at New Delhi, Rajasthan, etc.

4) Menthol is the raw material used in the manufacture of menthol crystals and peppermint oil emerges as a by-product in the manufacture of menthol crystals. This peppermint oil which emerges in the manufacture of menthol crystals contains impurities and therefore it is subjected to a process by which the impurities are removed and then cleared in the present case for export. Although the process of removing the impurities does not amount to manufacture, it is not in dispute that the peppermint oil which emerges in the process of manufacturing menthol crystals is excisable under the Central Excise Act, 1944. The assessee took credit of duty paid on menthol and utilized the said credit in paying the duty on clearance of the final products namely, menthol crystals and peppermint oil.

5) By a Notification No.4/2008-C.E. dated 1/3/2008 excise duty on menthol crystals was exempted. However, levy of excise duty on peppermint oil continued. Thus, with effect from 1/3/2008 menthol crystals were liable to be cleared without payment of duty, whereas, peppermint oil was liable to be cleared on payment of duty.

6) In the present case, it is not in dispute that even after 1/3/2008 the entire quantity of menthol crystals and peppermint oil manufactured by the assessee have been exported and domestic clearances have not been made. The assessee has cleared menthol crystals for export under bond without payment of excise duty and cleared peppermint oil for export on payment of excise duty by debiting the input credit availed on menthol used in the manufacture of final products. Since rebate of duty paid on exported goods is allowable under Rule 18 of the Central Excise Rules 2002, the assessee applied for rebate of duty paid on export of peppermint oil.

7) The Commissioner of Central Excise, New Delhi under whose jurisdiction the peppermint oil was manufactured and exported by a unit of the assessee was of the opinion that since menthol crystals manufactured from menthol was exempt from payment of duty, the credit of duty paid on menthol (input) was not available and consequently, the assessee could not have utilized the said input credit in paying the excise duty on clearance of peppermint oil for export. Accordingly, show-cause notices were issued to the assessee, to show cause, as to why excise duty should not be recovered on the peppermint oil exported by the assessee. The assessee in its reply submitted that since both the final products were exported, the assessee was entitled to utilize the input credit in paying the excise duty on peppermint oil and claim rebate of that duty. The Commissioner of Central Excise, New Delhi by order in original dated 31/8/2009 accepted the contention of the assessee and dropped the proceedings. The said order has been reviewed and appeal has been filed by the revenue against the order dated 31/8/2009 and the same is pending before the CESTAT at New Delhi.

8) The excise authorities in Rajasthan had also issued a show cause notice to reject the rebate claim filed by the assessee on the ground that in the Bhiwadi Unit at Rajasthan, the peppermint oil was subjected to a process to remove the impurities and such a process of removing the impurities does not amount to manufacture and, therefore, no excise duty was payable on clearance of purified peppermint oil and consequently allowing the rebate claim of duty paid on purified peppermint oil does not arise at all. The assessee contended that even if the process of removing the impurities in the peppermint oil did not amount to

manufacture, excise duty was payable on the manufacture of peppermint oil and, therefore, duty had to be paid at the time of clearance of peppermint oil and when peppermint oil is exported on payment of duty, the exporter is entitled to seek rebate of that duty paid on peppermint oil. The said explanation given by the assessee was accepted by the excise authorities at Rajasthan and by an order in original dated 6/4/2010 the show cause notice was dropped and rebate claim was allowed. Subsequently, the order dated 6/4/2010 has been reviewed and appeal has been filed by the revenue before the Commissioner (A), Jaipur and the same is pending.

9) In the meantime, rebate claims filed by the assessee from time to time before the Maritime Commissionerate, Raigad were initially allowed and rebate amount of Rs.45,68,70,421/- and Rs.37,51,698/- were sanctioned and paid to the assessee vide two orders in original dated 1/9/2009 and 22/9/2009 respectively, but without allowing interest claimed by the assessee under Section 11BB of the Central Excise Act, 1944. However, subsequent rebate claims filed by the assessee seeking rebate of Rs.29,59,27,180/-, Rs.4,40,35,201/- and Rs.1,16,77,065/- respectively were rejected by the Commissioner, Raigad by three orders in original all dated 30/4/2010 on the ground that rebate claim was not allowable.

10) Challenging the orders in original dated 1/9/2009 and 22/9/2009 whereby the rebate claim was allowed, the revenue filed appeals before Commissioner (A). Similarly, challenging the three orders in original all dated 30/4/2010 whereby rebate claim was rejected, the assessee filed appeals before Commissioner (A).

11) By a common order dated 14/09/2010, the Commissioner (A) dismissed the appeals filed by the revenue and allowed the appeals filed by the assessee. As a result whereof the assessee became entitled to receive the rebate amount of Rs.29,59,27,180/-, Rs. 4,40,35,200/- and Rs.1,16,77,065/- and retain the rebate amount already received under orders in original dated 1/9/2009 and 22/9/2009.

12) Challenging the order passed by the Commissioner (A) on 14/9/2010, the revenue filed Revision Applications under Section 35EE of the Central Excise Act, 1944. Along with the Revision Applications, the revenue filed Applications seeking stay of the order passed by the Commissioner (A). By the impugned order dated

21/1/2011 the Joint Secretary, Government of India rejected the stay application firstly, on the ground that there is no provision for grant of stay in revision proceedings and secondly, since similar rebate claims have already been allowed and paid in the past, it was not a fit case for grant of stay. Challenging the aforesaid order, the present Writ Petition is filed by the Commissioner of Central Excise, Raigad. As noted earlier, the Writ Petition has been heard on merits by consent of the parties on the question as to whether in law the assessee is entitled to claim rebate of duty paid on export of peppermint oil by reversing credit of duty paid on inputs used in the manufacture of exempted menthol crystals and dutiable peppermint oil.

13) Before dealing with the rival contentions, we deem it proper to reproduce herein below some of the rules (to the extent relevant) under the CENVAT Credit Rules, 2004:-

" RULE 3. CENVAT Credit - (1) A manufacturer or producer of final products or a provider of taxable service shall be allowed to take credit (hereinafter referred to as CENVAT credit) of- (i) the duty of excise specified in the First Schedule to the Excise Tariff Act, leviable under the Excise Act; (ii) the duty of excise specified in the Second Schedule to the Excise Tariff Act, leviable under the Excise Act; (iii) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Textile and Textile Articles) Act, 1978 (40 of 1978);

(iv) to (xi) -----

paid on -

(i) any input or capital goods in the factory of manufacture of final product or premises of the provider of output service on or after the 10th day of September, 2004; and

(ii) any input service received by the manufacturer of final product or by the provider of output services on or after the 10th day of September, 2004,

including .....

(2) ----------

(3) ----------

(4) ----------

(5) When inputs or capital goods, on which CENVAT credit has been taken, are removed as such from the factory, or premises of the provider of output service, the manufacturer of the final products or provider of output service, as the case may be, shall pay an amount equal to the credit availed in respect of such inputs or capital goods and such removal shall be made under the cover of an invoice referred to in rule 9.

(6) The amount paid under [sub-rule (5) and sub-rule (5A)] shall be eligible as CENVAT credit as if it was a duty paid by the person who removed such goods under [sub-rule (5) and sub-rule (5A)]"

Rule 5 Refund of CENVAT credit - Where any input or input service is used in the manufacture of final product which is cleared for export under bond or letter of undertaking, as the case may be, or used in the intermediate product cleared for export, or used in providing output service which is exported, the CENVAT credit in respect of the input or input service so used shall be allowed to be utilized by the manufacturer or provider of output service towards payment of,

(i) duty of excise on any final product cleared for home consumption or for export on payment of duty; or (ii) service tax on output service, and where for any reason such adjustment is not possible, the manufacturer or the provider of output service shall be allowed refund of such amount subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification.

Rule 6. Obligation of manufacturer of dutiable and exempted goods and provider of taxable and exempted services - (1) The CENVAT credit shall not be allowed on such quantity of input or input service which is used in the manufacture of [exempted] goods or for provision of exempted services,] except in the circumstances mentioned in sub-rule (2).

[Provided that the CENVAT credit on inputs shall not be denied to job worker referred to in rule 12AA of the Central Excise Rules, 2002, on the ground that the said inputs are used in the manufacture of goods cleared without payment of duty under the provisions of that rule.]

(2) Where a manufacturer or provider of output service avails CENVAT credit in respect of any inputs or input services, and manufactures such final products or provides such output service which are chargeable to duty or tax as well as exempted goods or services, then the manufacturer or provider of output service shall maintain separate accounts for receipt, consumption and inventory of input and input service meant for use in the manufacture of dutiable final products or in providing output service and the quantity of input meant for use in the manufacture of exempted goods or services and take CENVAT credit only on that quantity of input or input service which is intended for use in the manufacture of dutiable goods or in providing output service on which service tax is payable.

(3) Notwithstanding anything contained in sub-rules (1) and (2), the manufacturer of goods or the provider of output service, opting not to maintain separate accounts, shall follow either of the following options, as applicable to him, namely :- (i) the manufacturer of goods shall pay an amount equal to five per cent of value of the exempted goods and the provider of output service shall pay an amount equal to six per cent of value of the exempted services; or

(ii) the manufacture of goods or the provider of output service shall pay an amount equivalent to the CENVAT credit attributable to inputs and input services used in, or in relation to, the manufacture of exempted goods or for provision of exempted services subject to the conditions and procedure specified to sub-rule (3A).

Explanation I. - If the manufacturer of goods or the provider of output service, avails any of the option under this sub-rule, he shall exercise such option for all exempted goods manufactured by him or, as the case maybe, all exempted services provided by him, and such option shall not be withdrawn during the remaining part of the financial year.

Explanation II. - For removal of doubt, it is hereby clarified that the credit shall not be allowed on inputs and input services used exclusively for the manufacture of exempted goods or provision of exempted service.

(3A) For determination and payment of amount payable under clause (ii) of sub-rule (3), the manufacturer of goods or the provider of output service shall follow the following procedure and conditions, namely :-

(4) -----

(5) -----

(6) The provisions of sub-rules (1), (2), (3) and (4) shall not be applicable in case the excisable goods removed without payment of duty are either -

(i) to (iva) ----- or

(v) cleared for export under bond in terms of the provisions of the Central Excise Rules, 2002; or "

14) Mr. Jetly, learned counsel appearing on behalf of the revenue submitted that in the present case, since the assessee has manufactured both dutiable and exempted goods but failed to maintain separate accounts for receipts, consumption and inventory of the inputs as per Rule 6(1) & 6(2) of the CENVAT Credit Rules, 2004 ('2004 Rules' for short), the assessee is not entitled to avail credit of duty paid on inputs used in the manufacture of exempted goods. He submitted that as per Rule 6(6)(v) of 2004 Rules, the assessee is not required to comply with the provisions of sub-rules (1) (2), (3) & (4) of Rule 6 if the excisable goods are cleared for export under bond. In the present case, the assessee has nor cleared the peppermint oil for export under bond and, therefore, the shelter provided under Rule 6(6)(v) is not applicable in the present case and rule 6(1) is attracted in the present case. He submits that the assessee has deliberately paid duty on peppermint oil by debiting the lapsed / unavailable CENVAT credit with malafide intention to claim that amount by way of rebate claim. 15) Mr. Jetly further submitted that once it is established that duty paid inputs are used in the manufacture of final products which are exempted, then the credit of duty paid on

inputs is not available and if the credit is already taken, the same has to be reversed or would lapse. In any event, the issue relating to lapsed / unavailable CENVAT credit is pending before the CESTAT, New Delhi in the assessee's own case and if at all rebate is to be sanctioned by Maritime Commissionerate, Raigad, the same can be sanctioned only after the decision of the CESTAT, New Delhi.

16) Mr. Sridharan, learned counsel appearing on behalf of the assessee on the other hand submitted that where exempted final products are cleared for export under bond as per Rule 6(6)(v) of 2004 Rules, then Rule 6(1) to 6(4) of 2004 Rules do not apply. In such a case, Rule 5 of the 2004 Rules provide that the exporter is entitled to utilize the input credit availed on the exempted final product to pay excise duty on dutiable final product. Accordingly, in the present case, credit of duty availed on menthol used in the manufacture of exempted menthol crystals has been utilised in paying the excise duty on peppermint oil as per Rule 5 of 2004 Rules. Since duty paid on exported goods is allowable as rebate, the assessee is entitled to claim the rebate of such duty.

17) Relying on a decision of this Court in the case of Repro India Ltd. V/s. Union of India reported in (2009) 235 ELT 614 (Bom) which is followed by various other High Courts, Mr. Sridharan submitted where duty paid inputs are used in the manufacture of dutiable final products as well as exempted final products and if both the final products are exported, then Rule 6(1) to to 6(4) would not apply and, therefore,the argument of the revenue that in such a case, the input credit lapses cannot be sustained. Accordingly, counsel for the assessee submitted that the order of the Commissioner of Central Excise (A) be upheld and the rebate claim be allowed to the assessee.

18) We have carefully considered the rival submissions. 19) Undisputed facts in the present case are that the duty paid menthol is used in the manufacture of menthol crystals and peppermint oil emerges as a by product and both these final products were liable for excise duty under the Central Excise Act, 1944. By a Notification No. 4/2008 dated 1/3/2008 excise duty on menthol (raw materials) as well as menthol crystals were exempted. Thus, with effect from 1/3/2008 excise duty became payable only on peppermint oil.

20) Excise duty paid on exported goods either in cash or by debiting the Cenvat credit availed on inputs used in the manufacture of exported goods can be claimed by the exporter as rebate of duty under Rule 18 of the Central Excise Rules, 2002. In the present case, the assessee has paid excise duty on the exported peppermint oil by debiting the Cenvat credit availed on menthol used in the manufacture of exempted menthol crystals and dutiable peppermint oil. 21) Basic argument of the revenue is that, where the duty paid inputs are used in the manufacture of final products which are exempted from payment of excise duty, then Cenvat credit on input is not allowable under Rule 6(1) of 2004 Rules. It is contended that where inputs are used in the manufacture of both exempted as well as dutiable final products, then the manufacturer can avail the input credit only on that quantity of input used in the manufacture of dutiable final product provided separate accounts are maintained for receipt, consumption and inventory of input used in the manufacture of final products as provided under Rule 6(2) of 2004 Rules or the manufacturer not opting to maintain separate accounts pays an amount on clearance of the exempted goods at the rate specified under Rule 6(3) of 2004 Rules. In the present case, it is contended by the revenue that the assessee has neither maintained separate accounts regarding inputs used in the manufacture of exempted / dutiable final products as provided under Rule 6(2) nor paid an amount on clearance of exempted menthol crystals as provided under Rule 6(3) of 2004 Rules and, therefore, the assessee could not avail credit of duty paid on menthol (input) and consequently, the duty paid on peppermint oil by debiting the input credit being not valid the question of allowing rebate of that duty does not arise at all. 22) It is true that under Rule 6(1) of the 2004 Rules, credit of duty paid on inputs is not allowable when the inputs are used in the manufacture of exempted final products. But Rule 6(2) of 2004 Rules provide that where the inputs are used in the manufacture of exempted as well as dutiable final products, then credit of duty paid on inputs used in the manufacture of dutiable final products is allowable, provided separate accounts regarding the receipt, consumption and inventory of the input used in the manufacture of dutiable final product are maintained. However, Rule 6(6) of 2004 Rules provides that the provisions contained in Rule 6(1) to 6(4) of 2004 Rules shall not apply in certain specified cases, where the excisable goods are cleared without payment of duty. Clause (v)

of Rule 6(6) of the 2004 Rules provides that where the exempted goods are cleared for export without payment of duty under Central Excise Rules, 2002, then the provisions contained in Rule 6(1) to 6(4) of 2004 Rules shall not apply. Thus, Rule 6(6) of 2004 Rules carves out an exception to the applicability of the provisions contained in Rule 6(1) to 6(4) in certain specified cases. 23) In the present case, admittedly, the exempted menthol crystals have been cleared for exports under bond without payment of duty and, therefore, the case of the assessee would be covered under Rule 6(6)(v) of 2004 Rules and consequently Rule 6(1) to 6(4) of 2004 Rules would not be applicable to the facts of the present case. In other words, in the present case, the credit of duty paid on menthol used in the manufacture of exempted menthol crystals is allowable, because, exempted menthol crystals have been exported under bond without payment of duty.

24) The question then to be considered is, whether excise duty on exported peppermint oil could be paid by debiting Cenvat credit availed on the inputs used in the manufacture of exempted menthol crystals ?

25) Rule 5 of the 2004 Rules specifically provides that where the exempted final product is cleared without payment of duty under bond, then the credit of duty paid on input used in the manufacture of the exempted final product shall be allowed to be utilised for payment of duty on any final product by way of adjustment of input credit and where for any reasons such adjustment is not possible, then refund of the unutilized input credit would be allowed.

26) In the present case, the assessee on export of exempted menthol crystals has utilized the Cenvat credit availed on inputs used in the manufacture of exempted menthol crystals for paying the excise duty on peppermint oil cleared for export as provided under Rule 5 of 2004 Rules. Thus, in the facts of the present case, since the credit of duty paid on input used in the manufacture of exempted final product is utilized for payment of excise duty on exported peppermint oil, the assessee, instead of getting refund of input credit under Rule 5 of 2004 Rules, is entitled to rebate of duty paid on exported peppermint oil as provided under Rule 18 of the Central Excise Rules, 2002.

27) The argument of the Revenue that in the present case, the credit of duty paid on menthol is not allowable or has lapsed for the reason that the duty paid menthol has been used in the manufacture of exempted menthol crystals cannot be accepted, because, admittedly the exempted menthol crystals have not been cleared for home consumption but have been cleared for export under bond and, therefore, Rule 6(1) to 6(4) of 2004 Rules would not apply, but Rule 6(6)(v) would apply. In other words, non allowability of input credit under Rule 6(1) to 6(4) of 2004 Rules is applicable only when the inputs used in the manufacture of exempted final products are cleared for home consumption without payment of duty and not when exempted final products are cleared for export without payment of duty under bond. In the present case, exempted menthol crystals has been exported without payment of duty under bond and, therefore, the assessee was entitled to take the credit of duty paid on menthol used in the manufacture of exempted menthol and utilize that credit for paying duty on clearance of peppermint oil. Since peppermint oil was exported on payment of duty, the assessee was entitled to claim rebate of duty paid on exported peppermint oil under Rule 18 of the Central Excise Rules, 2002. 28) In the result, we hold that in the facts of the present case, since the exempted menthol crystals as well as dutiable peppermint oil manufactured out of duty paid menthol have been exported by the assessee, the provisions of Rule 6(1) to 6(4) of the 2004 Rules are not applicable and as per Rule 5 of 2004 Rules, the assessee was entitled to avail the Cenvat credit of duty paid on menthol used in the manufacture of exempted menthol crystals and utilize the said credit for payment of duty on clearance of peppermint oil either for home consumption or for export. In the present case, since the peppermint oil has been exported on payment of duty, the assessee was entitled to claim rebate of the duty paid on peppermint oil.

29) For all the aforesaid reasons, the petition filed by the Commissioner of Central Excise fails. The assessee is entitled to the rebate of duty paid on peppermint oil amounting to Rs.38,03,89,634/- deposited in this Court by the Commissioner of Central Excise, Raigad pursuant to the order passed in Writ Petition No.8068 of 2010. The Registry is directed to pay that amount of Rs.38,03,89,634/- to the respondent No.1 - assessee.

30) At this stage, Mr. Jetly, learned counsel for the Commissioner of Central Excise seeks stay of the operation of this order for four weeks. We see no reason to stay the operation of our order because, firstly, in the past the Commissioner of Central Excise has himself allowed similar rebate claims of the assessee. Secondly, the Joint Secretary to the Government of India is also of the opinion that it is not a fit case for grant of stay and thirdly, even in our opinion, the provisions are clear and unambiguous and the delay in allowing the rebate claim for all these years, has already caused prejudice to the assessee and, therefore, it would not be proper to cause any further prejudice to the assessee by granting stay of our order. No order as to costs.