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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Aug-02-1996

Reported in : (1996)(86)ELT660TriDel

Appellant : Flex Engg. Ltd.

Respondent : Collector of Central Excise

Judgement :

1. This is a reference application under Section 35G(1) of the Central Excises & Salt Act, 1944 arising from the order of this Tribunal dated 24-11-1995. The question arose in this case whether flexible plastic films/ poly paper can be regarded as an input for the manufacture of filling and sealing machines (F.S. machines) and also whether the cost of flexible plastic films/poly paper was eligible for Modvat credit as an input. Relying on the decision of the Tribunal in Collector v. Rash Extrusions Technic reported in 1988 (38) E.L.T. 367 and other decisions and on an analysis of the provisions of Rule 57A of the Central Excise Rules, 1944, the Tribunal held that the materials used for testing fully finished machines cannot be considered as materials used "in or in relation to" the manufacture of the finished product. The Tribunal also held that from a perusal of the Scheme which excludes manufacture from the coverage of inputs for the purposes of credit of duty, the order passed by the lower authorities cannot be sustained and the appeal of the revenue has to be allowed.

2. In the present reference application the applicants have raised six points which, according to them, were questions of law arising out of the order of the Appellate

Tribunal and which require to be referred to the High Court, namely :- (a) Whether in the circumstances of the case the material used in testing the machines for forming an opinion as to its marketability would be eligible for taking credit under Rule 57A read with relevant notification; (b) Whether the material used in testing can be said to be "used in the manufacture of" or "used in Delation the manufacture of finished products" namely, the machines; (c) Whether the Tribunal was justified in distinguishing between anterior and posterior processes for holding that the use of plastic films for testing was a posterior process and whether Rule 57A allowed such distinction; (d) Whether the Tribunal was justified in holding that the machine had reached RG 1 stage even prior to testing notwithstanding the Tribunal decision in D.S. Sareen v. CCE; (e) Whether the judgment referred to by the applicants in their appeal fully justified their availing Modvat credit on specified material; (f) Whether the Tribunal was justified in following the decision in CCE v. Rash Extrusions (supra) which according to the applicants did not appreciate the relationship of testing process to the manufacturing activity and its machines for the manufacturer to exercise his commercial/technical judgment on where marketable commodity in the form of a notional machine had come into existence.

3. In a further written memo submitted by the counsel for the applicant on 24-4-1996 applicants have stated that there were conflicting decisions of the Tribunal on the question as to whether the materials that are used for testing machines are to be considered as inputs for purposes of allowing Modvat credit. Reference is made in this connection to a decision of Western Bench of CEGAT wherein it is claimed that the Tribunal had held that materials used in carrying out tests are in the category of inputs and entitled to Modvat credit. No copy of the said decision was however placed before us for consideration. Reference has also been made to a Supreme Court decision in 1989 (43) E.L.T. 201 (S.C.) - CCE v. Eastend Paper Industries in which the Supreme Court had held that since paper was marked in packed or wrapped condition, the wrapping paper used in the wrapping of paper, it is to be treated as raw material or component part of the paper which is wrapped. The Supreme Court had also in the said judgment noted with approval its earlier judgment in CCE v. Jay Engg. Works -1989 (39) E.L.T. 169 in which name plates of manufacturers fixed on fans was held to be components for purposes of proforma credit. In the Tribunal decision of Western Regional Bench

referred to by the applicant i.e.

Walchandnagar Industries v. CCE, Pune - 1996 (83) E.L.T. 117 (Tribunal) the WRB had held that Radiography tests for detection of cracks, defects etc. in welded parts of Nuclear reactors, boilers were essential for making final products marketable and therefore X-ray films used in such radiography tests are inputs eligible to Modvat credit under Rule 57A. In view of the said decision counsel has stated in the application that a reference to the High Court on the questions of law arising from the decision of the Tribunal was warranted.

4. Shri Gopal Prasad appearing for the applicants submitted that there was conflict of decisions Between the Benches of the Tribunal on the question as to what constitutes input for purposes of claiming Modvat credit and that this gave rise to a question of law for being referred to the High Court under Section 35G(1) of the Act. Opposing the application D.R. Shri Sanjeev Sachdeva contended that the question as to what constitutes an input for purposes of Rule 57A was primarily a question of fact and would not give rise to a question of law warranting reference to the High Court. He contended that the Tribunal had by its impugned order correctly found that the items used for testing a machine which has already been manufactured would not be eligible for purposes of claiming credit under Rule 57A and there was no question of law involved meriting reference under Section 35G(1).

4A. We have considered the submissions. In the case under consideration it is seen that the order dated 24-11-1995 had clearly examined the provisions of Rule 57A and the aspect of what constitutes input for claiming Modvat credit. The Tribunal had examined the relevant case law on the subject and had relied on its earlier decision in CCE v. Rash Extrusions (supra) for deciding the admissibility of claim for Modvat credit. The case before the Tribunal were similar in material particulars inasmuch as inputs in carrying out the tests were for the purposes of knowing whether the machine was performing the functions it was meant to carry out. In both the instances the inputs on which Modvat credit was being claimed were at the stage of post manufacture and this was the ground on which the claim for Modvat credit was held to be inadmissible. It was found that machine had

already been manufactured and the testing that was carried out was only for purposes of assessing its performance before being sent to the customer. The distinction sought to be made by counsel as to the use of the inputs at the posterial stage does not make any material change as to the findings of the Tribunal in the impugned order.

5. As regards the decision of the Supreme Court in Eastend Paper Industries (supra), the facts of that case are clearly distinguishable inasmuch as the said case involved the use of wrapping paper as cover for manufactured paper for purposes of marketing in which case it was held that it had become a component part of the end product. The case of Walchandnagar Industries also is clearly distinguishable on the facts of that case since the X-ray films were used for ensuring the requirements of the buyer. In the same order the Tribunal had observed that laboratory chemicals brought in use in R & D laborators cannot be treated on the same footing. In the case under discussion input under discussion was not different from laboratory chemicals used for R & D purposes. The fact that the machine manufactured were meant to answer the specifications of the buyer does not detract from the fact that the input used for testing was of the type used for R & D purposes.

6. In the above view of the matter we are not satisfied that any question of law has been raised warranting reference to the High Court under Section.

7. Further, as has been held by the Gauhati High Court in Collector of Income Tax v. Basanta Kumar Agarwalla and Anr. the Tribunal is not obliged to refer every question of law arising out of an order. A "point of law" cannot be equated with the expression "question of law." For referring a matter to the High Court the question must be a dispute or a disputable question of law. A Tribunal is obliged to refer only a question of law which calls for investigation, examination, and debate.

Where a point of law decided by the Tribunal is positively certain, there is no obligation on the part of the Tribunal to refer the matter as the point cannot be termed as a question of law. It is not every point of law that is required to be referred by the Tribunal to the High Court when the question is simple, obvious and self-evident. It cannot be framed as a question of law and the Tribunal is not

bound to refer such a question. In the instant case, which raises primarily fact-related issues, no question of law has been shown requiring reference. The six points referred to in the application cannot also be supported on the basis of the earlier decision of the Tribunal.

8. Further, the decision cited by the applicant, in Walchandnagar Industries case (supra) can clearly be distinguished in the sense that the Tribunal had clearly observed that chemicals etc. used for R and D purposes cannot be considered to be inputs. The inputs used in the instant case, viz., flexible plastic films/pole paper clearly fall in the said category. The applicant has not therefore been to establish any divergence of views between two Benches of the Tribunal.

9. In view of the above and in view of the observations made by the Guahati High Court (supra), we find no merit in the application filed by the applicants for making a reference to the High Court under Section 35C of the Act. The application is accordingly rejected.

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