Commissioner of Central Excise Vs CESTAT

Court: Madras High Court

Date of Decision: June 14, 2013

Citation: (2014) 299 ELT 166

Hon'ble Judges: K.B.K. Vasuki, J; Chitra Venkataraman, J

Bench: Division Bench

Advocate: S. Thirumavalavan, for the Appellant;

Judgement

Chitra Venkataraman, J.
The Revenue is on appeal as against the order of the Customs, Excise and Service Tax Appellate Tribunal,

Chennai passed in Final Order No. 1219/2007, dated 27-9-2007 [2008 (230) E.L.T. 126 (Tri.-Chennai)]. Though notice was served as early as

on 21-5-2008, there is no appearance either in parson or through counsel on behalf of the assessee. After hearing the learned standing counsel for

the appellant and after going through the records, the present judgment is being passed. The above appeal was admitted on the following

substantial question of law:--

(i) Whether the first respondent is right in recalling its order in the guise of exercising power u/s 35C(2) of the Central Excise Act, which provides

for error apparent on the face of the record?

2. The assessee is engaged in the manufacture of aerated waters falling under Chapter sub-heading 2202.02 of the Central Excise Tariff Act,

1985. They also manufactured "Slice" a fruit pulp based soft drink/fruit juice based soft drinks falling under Chapter sub-heading 2202.40, which

was fully exempted from payment of duty under Notification No. 6/2002 C.E., dated 1-3-2002. The assessee availed Canvat credit on the inputs

of bottle "plastic crates" used for packing and distribution of their final products. Apart from that, they also availed Cenvat credit on "furnace oil"

used in the manufacture of their final products.

3. Admittedly, furnace oil was used in the manufacture of both dutiable and exempted final products. As per Rule 6(2) of Cenvat Credit Rules,

2004, as amended by Notification No. 27/2005-C.E. (NT.), dated 16-5-2005, in order to avail Cenvat credit, separate accounts have to be

maintained in respect of inputs used in the manufacture of both dutiable as well as exempted final products. In the absence of maintenance of such

separate accounts, as per Rule 6(3)(b) of Cenvat Credit Rules, 2004, the assessee is liable to pay 10% of the sale of price of "Slice" cleared

during the material period. Considering this, show cause notice was issued by the Adjudicating Authority covering the period from 1-10-2004 to

30-9-2005 in terms of Explanation II to Rule 6(3)(c) of the Cenvat Credit Rules, 2004 r/w Rule 14 of Cenvat Credit Rules, 2004 and Section

11A of the Central Excise Act, 1944. After due process of the notice, a demand was raised, along with interest payable by the assessee. Penalty

of Rs. 20 lakhs was also imposed under Rule 15(1) of the Cenvat Credit Rules, 2004 (hereinafter shortly referred to as "CCR, 2004").

4. Aggrieved by this, the assessee went on appeal before the Customs, Excise and Service Tax Appellate Tribunal, by contending that Rule 6(3)

(b) of CCR, 2004 would not be applicable in respect of furnace oil, since entire Cenvat credit availed on furnace oil was already reversed, much

before the issuance of show cause notice and the same was also communicated to the Revenue. In considering the assessee"s contention, in the

order dated 30-4-2007, the Tribunal pointed out that when the assessee had not maintained separate accounts in respect of furnace oil used in the

manufacture of both dutiable and exempted final products and cleared by the assessee during the material period, the impugned clearance attracted

the provisions of Rule 6(3)(b) of CCR, 2004. The Tribunal further pointed out that subsequent reversal, by itself, would not exonerate the assessee

from payment of duty in terms of Rule 6(3)(b). Thus, the Tribunal held that in terms of Rule 6(3)(b) of CCR, 2004, the assessee was liable to pay

10% of the sale price of "Slice" cleared during the material period. However as regards penalty of Rs. 20,00,000/- imposed on the assessee, the

Tribunal held that the mere application of Rule 6(3)(b) should not result in penal action. Thus the Tribunal thought it fit to reduce the penalty from

Rs. 20,00,000/- to Rs. 1,00,000/-. Hence, the appeal was partly allowed. Admittedly, the assessee has not challenged this order before this

Court.

5. It is seen from the records that the assessee preferred an application for rectification of the mistakes in the order on 31-5-2007, wherein, the

assessee specifically pointed out that Rule 6(2) was erroneously applied to the entire period of dispute from 1-10-2004 to 30-9-2005. Rule 6(2)

of CCR, 2004 was amended with effect from 16-5-2005 under Notification No. 27/2005-C.E. (N.T.). This was erroneously applied to the entire

period and the amended Rule was not applicable for the period prior to 16-5-2005 i.e., on the exempted "Slice" cleared by the assessee from 1-

10-2004 to 15-5-2005. If at all Rule 6(2) was applicable, the same would be only for the limited period from 16-5-2005 to 31-8-2005 and not

to the earlier period. By order dated 8-8-2007 in Misc. Order. No. 638/2007 [2007 (220) E.L.T. 404 (Tri.-Chennai)], the Tribunal accepted the

plea of the assessee on this and corrected its order. It was pointed out that the assessee had not taken credit on furnace oil from 1-9-2005 and

hence, the provisions were not applicable. It is not seriously canvassed by the Revenue that considering the fact that Rule 6(2) was amended under

Notification No. 27/2005, the same would not be applicable to the period prior to 16-5-2005.

6. The second mistake pointed out by the assessee seeking rectification was on the question as to whether subsequent reversal of Cenvat credit

taken on inputs used in the manufacture of exempted final product would tantamount to non-availment, of such credit so as to render Rule 6(3)

inapplicable. On this, the Tribunal considered the decisions of the Supreme Court reported in Chandrapur Magnet Wires (P) Ltd., Nagpur Vs.

Collector of Central Excise, Central Excise Collectorate, Nagpur, as well as the order of the Tribunal in Ballarpur Industries Ltd. v. CCE., Nagpur

[2006 (201) E.L.T. 146] and Commissioner of Central Excise vs. Philips India Ltd. and allowed the assessee''s claim holding that the mistake was

an apparent mistake. Thus, the Tribunal recalled its order dated 30-4-2007.

7. Thus, by order dated 27-9-2007, the Tribunal considered the claim afresh and passed the final order allowing the assessee''s claim. The

Tribunal held that the assessee reversed the credit on furnace oil not only corresponding to exempted finished goods, but also on the entire goods

manufactured using the common input, namely, furnace oil from 16-5-2005 to 31-8-2005. Thus, on facts, it held that when the entire credit taken

was reversed, there was no question of the assessee paying any amount to offset the credit taken. In this, the Tribunal relied on the decision of the

Supreme Court reported in Chandrapur Magnet Wires (P) Ltd., Nagpur Vs. Collector of Central Excise, Central Excise Collectorate, Nagpur,

and the decision of the Allahabad High Court reported in Hello Minerals Water (P) Ltd. Vs. Union of India (UOI), . The Tribunal held that

reversal of Modvat credit subsequent to clearance of goods amounted to non-taking of Modvat credit on inputs for availing exemption on goods.

Since the assessee could not ascertain the quantum of furnace oil relatable to the exempted slice, they reversed the entire credit availed on furnace

oil. Thus, on the findings given, the demand in terms of Rule 6(3)(b) of the CCR, 2004 was set side.

8. Aggrieved by this, the present appeal by the Revenue. Learned standing counsel appearing for the Revenue submitted that in the guise of

rectification, the Tribunal had practically reviewed its order. In the absence of any provision on review and on facts which are not admitted and

there being no error apparent, the order of the Tribunal suffers serious illegality and hence liable to be set aside. While not disputing the fact that the

assessee had reversed the entire credit taken on furnace oil during the material period, learned standing counsel submitted that the only option

available in cases where it is not possible to maintain separate accounts would be Rule 6(3)(b), whereby the assessee has to pay duty equal to the

percentage of the total price excluding sales tax and other taxes, if any, paid on such goods, charged by the manufacturer. As the assessee had

availed credit on furnace oil, the only option available is Rule 6(3)(b), which does not include the case of reversal at a later date after clearing the

goods.

9. It is further pointed out that The assessee availed Cenvat credit on furnace oil, on the goods cleared from October, 2004 to September, 2005

and utilised the same. It revised the credit of Rs. 4,97,596/- in September, 2005 and reported the same in RT-12 return. The actual reversal being

only after clearance and in September, 2005, the demand could not be set aside particularly in the rectification proceedings; further the issue on

whether the reversal of credit amounted to not taking credit is pending in appeal before the Apex Court against the decision reported in 2006

(203) E.L.T. 290 (Tri.-Mumbai) (CCE, Mumbai-I v. Bombay Dyeing & Mfg. Co. Ltd.). Learned standing counsel submitted that the Department

is aggrieved by the order, particularly on the question as to whether reversal of credit amounted to not taking credit, that too made long after the

removal of the goods.

10. A reading of the rectification application made by the assessee would show that the issue raised is an arguable issue. The assessee pointed out

that, the Tribunal had wrongly applied the amended Rule to the prior period from 1-10-2004 to 15-5-2005 when the said rule was not in

operation. Thus, the dispute on question of applicability of Rule 6 would arise only for the period 16-5-2005 to 31-8-2005 and not for the period

prior to or after that date. Learned standing counsel pointed out that the Revenue''s dispute is particularly related to the contention of the assessee

on the reversal of credit as amounting to non-availing of credit as an error apparent requiring rectification. We find justification in the Revenue''s

contention that when the rectification of mistake sought for is an arguable issue, the Tribunal erred insofar as the rectification of second mistake is

concerned and the same could not be considered based on any decision relied on by the assessee in the rectification order.

11. Learned standing counsel for the Revenue placed reliance on the decisions of the Supreme Court reported in Commissioner of Central Excise

Vs. A.S.C.U. Ltd., and Commissioner of Central Excise Vs. A.S.C.U. Ltd., on the scope of jurisdiction of the Tribunal on rectification of mistake.

In the decision reported in 2011 (270) E.L.T. 625 (S.C.) [RDC Concrete (I) Pvt. Ltd.], the Apex Court pointed out that reappreciation of

evidence on a debatable point cannot be said to be rectification of mistake apparent on record. The Apex Court pointed out that if the Tribunal

failed to take into consideration something which was not on record, the Tribunal could be said to have committed a mistake apparent on the face

of the record. In para 21, it observed:--

21. This Court has decided in several cases that"s mistake apparent on record must be an obvious and patent mistake and the mistake should not

be such which can be established by a long drawn process of reasoning. In the case of T.S. Balram v. M/s. Volkart Brothers (supra), this Court

has already decided that power to rectify a mistake should be exercised when the mistake is a patent one and should be quite obvious. As stated

hereinabove, the mistake cannot be such which can be ascertained by a long drawn process of reasoning. Similarly, this Court has decided in The

Income Tax Officer, Alwaye Vs. The Asok Textiles Ltd., Alwaye, that while rectifying a mistake, an erroneous view of law or a debatable point

cannot be decided. Moreover, incorrect application of law can also not be corrected.

12. In the decision reported in Commissioner of Central Excise Vs. A.S.C.U. Ltd., , the Apex Court observed as follows:--

13. .....the scope of correction which can be made by the Tribunal u/s 35C(2) is limited. Undoubtedly if a decision is based solely on material

which is irrelevant or which could not have been used then possibly it could be said that there is a mistake apparent from the record. However, if a

decision is based on more than one material, then merely because in the process of arriving at the final decision, reliance was, placed on same

material which could not have been used it can never be said that in the final decision there is a mistake apparent from the record. This is because

the final opinion could also have been based on the other material which was relevant and which could be used.

Having regard to the categorical pronouncement of the Apex Court that when the error pointed out is evidently of a disputed nature, the order of

rectification being on an arguable issue, we have no hesitation in allowing the appeal filed by the Revenue to that extent. Consequently, the above

Civil Miscellaneous Appeal is allowed in part. No costs.