

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved on: 3.9.2015 and Pronounced on: 16.9.2015

Coram

The Honourable Mr. Justice V. RAMASUBRAMANIAN
and
The Honourable Mr. Justice T. MATHIVANAN

C.M.A.No.386 of 2011

M/s. Mohan Breweries & Distilleries Ltd.
rep. by its Company Secretary T. Krishnamurthy,
PIDDIC Industrial Estate,
Mettupalayam, Pondicherry-605 009.

...Appellant

Vs.

The Commissioner of Central Excise,
Pondicherry Commissionerate
Goubert Avenue, Beach Road,
Pondicherry 605 001.

...Respondent

Civil Miscellaneous Appeal filed under Section 35G of the Central Excise Act, 1944 against the Final Order No.1347 of 2008 dated 27.11.2008 made in Appeal No.E/430/2006 by the Customs, Excise and Sales Tax Appellate Tribunal, Chennai in so far as it seeks to disallow cenvat credit on the additional duty of customs paid by adjusting the DEPB scrip.

For Appellant : Mr.C.Saravanan
For Respondent : Mr.E.Vijay Anand, CGSC

JUDGMENT

V. RAMASUBRAMANIAN, J

This appeal is filed by the assessee under Section 35G of the Central Excise Act, 1944, raising the following question of law:-

"Whether in the absence of any restriction in the provisions of the Cenvat Credit Rules, 2002 and as in force during the period in dispute, the Tribunal was justified in holding that the appellant was dis-entitled to Cenvat Credit merely on the strength of the Exim policy as in force?"

2. Heard Mr.C.Saravanan, learned counsel for the appellant and Mr.E.Vijay Anand, learned Central Government Standing Counsel for the respondent.

3. The appellant is engaged in the manufacturer of glass bottles falling under Tariff sub-heading No.7007.90 of the First Schedule to the Central Excise Tariff Act, 1985.

4. The appellant imported certain raw-materials under a Bill of Entry dated 25.1.2003 and availed Cenvat Credit on the additional duty of customs to the tune of Rs.3,88,894/-. The appellant availed the benefit of the Notification No.34/97-Cus. dated 7.4.1997 and cleared the goods by debiting the DEPB for both customs duty payable under the Customs Act, 1962 and the additional customs duty leviable under Customs Tariff Act, 1975.

5. The Department issued a show cause notice dated 7.10.2003, calling upon the appellant to show cause as to why the Cenvat Credit availed by them should not be recovered under Rule 12 of Cenvat Credit Rules, 2002 read with Section 11-A of the Central Excise Act, 1944. The appellant submitted a reply to the show cause notice. However, by an Order-in-Original passed on 31.3.2005, the Deputy Commissioner of Central Excise followed the decision of a Larger Bench of CESTAT in ESSAR Steel Ltd., v. Commissioner of Central Excise [173 ELT 239] and held that the appellant was not entitled to take credit of CVD based on the debit entry under DEPB Scheme. Therefore, the Original Authority directed the recovery of the amount of Cenvat Credit availed by the appellant and also imposed penalty of Rs.1,20,000/-.

6. The appellant filed a statutory appeal. By an order passed on 28.2.2006, the Commissioner (Appeals) confirmed the order of recovery and directed the appellant to pay interest. However, the Appellate Commissioner set aside the penalty.

7. The appellant filed a further appeal before the Tribunal. But the Tribunal dismissed the appeal by a final order dated 27.11.2008. Therefore, aggrieved by the said order, the appellant is before us.

8. The stand taken by the Original Authority was that unless Countervailing Duty (CVD) had been paid in cash, the assessee was not entitled to take credit based merely upon the debit entry in the passbook under DEPB Scheme. The Original Authority, as stated earlier, relied upon the decision of a Larger Bench of CESTAT in ESSAR Steel Limited. The Appellate Authority followed its own order in an identical case in Appeal No.80 of 2005 passed in the case of Spic Pharmaceuticals Division, Cuddalore. In the said case also, the Appellate Commissioner had taken a view that a debit entry in the Passbook cannot be equated to payment in cash. The Appellate

Commissioner had further held that a duty not paid and specifically exempted cannot be taken as paid because of debit entries.

9. The Tribunal relied upon para 7.4.1 of the Exim Policy, as it was in force at the relevant time and held that Cenvat Credit would not be available for the additional duty of customs discharged using DEPB Scrip. According to the Tribunal, the importers of inputs were given an option under para 4.3.2 of the Exim Policy either to pay the additional customs duty in cash or to discharge liability using DEPB Scrip. Therefore, the Tribunal confirmed the decisions of the Original Authority and the First Appellate Authority, on the basis of the Larger Bench decision of CESTAT in ESSAR Steel Limited.

10. To find answer to the question of law raised in the appeal, it is necessary to have a look at the Notification No.31/97. Under this Notification, issued in exercise of the powers conferred by Section 25(1) of the Customs Act, 1962, the Central Government exempted the goods imported into India both from the whole of the customs duty and from the whole of the additional customs duty, subject to certain conditions. One of the conditions stipulated in the Notification is that the importer has been issued a Duty Entitlement Passbook DEPB by the licensing authority and the importer had been permitted credit entries in the DEPB. Subsequently, a Circular bearing No.5/2005-Cus. dated 31.1.2005 was issued. The Circular was actually on the question whether 2% Education Cess is to be leviable on the imports cleared under several Schemes including DEPB Scheme. It was stated in the said Circular as follows:-

"As per the Notifications governing imports under DEPB Scheme, the basic duty and additional duty are exempt subject to the conditions that the duties leviable on the goods are debit from DEPB. In other words, in the case of DEPB Scheme, though the imports are governed by an exemption Notification, the fact remains that in case of such imports duty is debited from the DEPB Scrip".

11. It is no doubt true, that under para 4.3.2, the holder of DEPB has the option to pay additional customs duty, in cash as well. Under para 4.3.5 of the Exim Policy, it was stated as follows:-

"4.3.5 Normally, the exports made under the DEPB Scheme shall not be entitled for drawback. However, the additional customs duty/excise duty paid in cash on inputs under DEPB shall be adjusted as CENVAT Credit or Duty Drawback as per rules framed by the Department of Revenue. In cases, where the additional customs duty is adjusted from DEPB, no benefit of CENVAT/Drawback shall be admissible."

12. It appears that the prescription contained in the last line of para 4.3.5 of Exim Policy was deleted under a Notification bearing No.28, dated 28.1.2004. In any case, it is contended by the learned counsel for the appellant that para 4.3.5 deals with export and it does not deal with a manufacturer making a Domestic Tariff Area clearance. Rule 5 of the Cenvat Credit Rules, 2002 makes it clear that where any inputs are used in the final products which are cleared for export under Tariff or Letter of Undertaking as the case may be, are used in the intermediate product cleared for export the Cenvat Credit in respect of the inputs so used shall be allowed to be utilized by the manufacturer towards payment of duty of Excise on any final product cleared for home consumption or for export on payment of duty. Where for any reason such adjustment is not possible, the manufacturer shall be allowed refund of such amount subject to the conditions specified.

13. It is contended by the learned counsel for the appellant that the respondents have not relied upon any provision in the Cenvat Credit Rules, 2002, to come to the conclusion that the appellant is not entitled to the benefit. Since Cenvat Credit Rules constitute a separate code by themselves, it is argued that the Tribunal committed an error in thinking that in view of para 7.4.1 of the Exim Policy, the appellant was not entitled to Cenvat Credit. Hence, the question of law raised by the appellant has to be answered in their favour.

14. But as pointed out by the learned Standing Counsel for the Revenue, DEPB Scheme was actually introduced in the Exim Policy, to neutralize the incidence of customs duty on import content of export products. The credit itself is available against exports products. What is refundable under Rule 5 of the Cenvat Credit Rules, 2002, is actually of "such amount" and hence the same can be relatable only to the payment.

15. Though the appellant claimed to have availed the benefit of exemption under Notification No.34/97, and cleared the goods by debiting DEPB, for both customs duty as well as additional customs duty, it is claimed by the respondents that under the relevant Bill of Entry bearing No.45901 dated 25.1.2003, they availed the benefit of exemption Notification No. 45/2002 dated 22.4.2002. The Notification No.34/97 dated 7.4.1997 relates to Exim Policy April 97-March 2002. But the Notification No.45/2002 pertains to Exim Policy April 2002-March 2007.

16. According to the respondents, when the Bill of Entry dated 25.1.2003, which is the relevant document specified in Rule 7 of the Cenvat Credit Rules, 2002, did not indicate payment of any duty, no Cenvat Credit can be availed. Therefore, we do not think that the Tribunal committed any mistake in law.

17. Under the Exemption Notifications, if the importers produced DEPB scrip and availed the exemption for clearance of goods, the goods become non-duty paid goods. The value of DEPB scrip, once used, gets extinguished and hence there would be no question of seeking Cenvat Credit thereafter.

18. In Commissioner of Central Excise v. Precision Pipes [2014 (302) ELT 184], the Allahabad High Court held that as per para 4.3.5 of the Exim Policy, it was only when the additional customs duty was paid in cash on inputs under DEPB that it could be adjusted against the Cenvat Credit or Duty Drawback.

19. As we have indicated earlier, the Commissioner (Appeals) as well as the Tribunal relied upon a Larger Bench decision of the CESTAT in ESSAR Steel Limited v. Commissioner [2004 (173) ELT 239]. The said decision is not overruled so far by any High Court. But according to the learned counsel for the appellant, the decision of the Larger Bench was watered down to a great extent by this Court in Commissioner of Central Excise v. Spic Limited [2014 (305) ELT 484].

20. But a careful look at the decision in Spic would show that the case related to imports made prior to the year 2000. In paragraph 16 of the decision in Spic, the Court pointed out as follows:

"16. It is no doubt true that under the Scheme available from 1.4.2000, there is a specific prohibition that wherever the additional customs duty is adjusted from DEPB, the assessee would not be entitled to Cenvat/Drawback. However, in the absence of any such specific prohibition for the period prior to 2000, considering the provision under Paragraph 7.25 that a holder of DEPB shall have the option to pay additional customs duty if any, in cash, the provision under Paragraph 7.41 could only be read as recognizing payment in cash too available for adjustment under Modvat Scheme. Thus, in the absence of any restrictive wording, we do not find any justification to deny the benefit of Modvat credit available to a case covered by the credit taken under the Passbook Scheme."

21. Therefore, after a specific prohibition was introduced under the Scheme from 1.4.2000 onwards, it is not possible for the appellant to claim the benefit in respect of the Bill of Entry of the year 2003. Therefore, the decision in Spic, even if it is taken to water down the decision of the Larger Bench in ESSAR Steel Limited, does so only in respect of the period prior to 2000. Therefore, the decision of this Court in Spic is not favourable to the appellant.

22. In view of the above, the question of law is answered against the appellant and the appeal dismissed. No costs.

-Sd/-
Assistant Registrar

//True copy//

Sub Assistant Registrar

gr/kpl

Copy to:

1. The Commissioner of Central Excise,
Pondicherry Commissionerate
Goubert Avenue, Beach Road,
Pondicherry 605 001.
2. The Registrar,
Customs, Excise and Sales Tax Appellate Tribunal,
Chennai

+1 cc to Mr.E.Vijasan, Advocate (sr.50996)
+1 cc to Mr.C.Saravanan, Advocate (sr.50578)

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