THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.10.2015

CORAM

THE HON'BLE MR.JUSTICE V.RAMASUBRAMANIAN
and
THE HON'BLE MR.JUSTICE T.MATHIVANAN

Civil Miscellaneous Appeal No.2092 of 2007

M/s. Kaleesuwari Refinery Pvt. Ltd.
No.5, Mambakkam Road
Vengaivasal, Chennai 600 073. .. Appellant /Appellant

Vs.

1. The Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench
Chennai, Shastri Bhavan Annex
Haddows Road, Chennai 600 006.

2. The Commissioner of Central Excise
Chennai III, No.121, Nungambakkam High Road
Chennai 600 034.

3. The Commissioner of Central Excise
Chennai IV Commissionerate
MHU Complex, 692, Anna Salai
Nandanam, Chennai 600 035... Respondents/Respondents

Appeal under section 35 G of the Central Excise Act 1944 against the Final order No.111/2007 dated 10.01.2007 made in Appeal No.E/364/2005 passed by the first respondent herein.

For Appellant : Mr.C.Saravanan
For Respondents 2 & 3 : Mr.A.P.Srinivas, SSC

J U D G M E N T
(Delivered by V.Ramasubramanian,J.)

This appeal is filed by the assessee under Section 35-G of the Central Excise Act, 1944, challenging the order in original passed by the Commissioner of Central Excise and the order passed by the CESTAT confirming the same, denying the appellant of the benefit of CENVAT credit on capital goods imported by the appellant during the financial year 2002-03.

2. Heard Mr.C.Saravanan, learned counsel for the appellant and Mr.A.P.Srinivas, learned Senior Panel Counsel for the respondents 2 and 3.

3. The appellant imported capital goods, during the period from April 2002 and March 2003. The appellant is a manufacturer of refined edible oils. During the period when the appellant imported capital goods, the main final product manufactured by the appellant, namely refined edible oil, was exempt from payment of duty. But, by a notification issued on 01.3.2003, the main final product, namely refined edible oil was made subject to duty.

4. However, it is an admitted fact that in the course of manufacture of the main final product, the appellant was also producing certain by-products such as "soap stock" and "wax". Therefore, the appellant claimed CENVAT Credit in terms of Rule 6(4), with effect from 01.3.2003, namely the date on which the main final product, namely refined edible oil became subject to duty.

5. However, a show cause notice dated 07.4.2004 was issued, alleging that the appellant was not entitled to CENVAT Credit on the capital goods, due to the fact that on the date of receipt of the capital goods, the goods were exempt from payment of duty. Insofar as the by-products are concerned, the show cause notice alleged that they constitute a very negligible percentage of the main final product manufactured by the appellant.

6. The appellant gave a reply dated 03.9.2004 and it was followed by a personal hearing on 14.10.2004. But, by an order-in-original passed on 15.02.2005, the Commissioner of Central Excise, reversed the input tax credit availed by the petitioner on the capital goods. It should be mentioned at this stage that the Order-in-original covered certain other items also, about which we are not concerned in the present appeal.

7. As against the Order-in-original, the appellant filed a statutory appeal before CESTAT. By a final order dated 08.02.2007, the Tribunal dismissed the appeal, following an earlier decision of the Tribunal in CCE v. Surya Roshni Ltd. [2003 (155) ELT 481] as well as the decision in Grasim Industries v. CCE [2004 (176) ELT 265] and Binani Cements Ltd. v. Commissioner of Central Excise [2002 (143) ELT 577]. Aggrieved by the said order of the Tribunal, the assessee has come up with the above appeal.

8. The appeal was admitted on 13.9.2007 on the following substantial questions of law:

"(1) Whether in the facts and circumstances of the case denial of CENVAT credit capital goods received in a given financial year can be denied merely because at the time of its receipt the appellant was also engaged in the manufacture of final product attracting nil duty ignoring the fact that the appellant was also engaged in the manufacture of dutiable final product which were exempted from duty in term of value based exemption notification No.8/2002-CE dated 1.3.2002?

(2) Whether in the facts and circumstances of the case denial of CENVAT credit on capital goods can be justified especially in view of the fact that the edible oil was subjected to duty in the same financial year in which the subject capital goods were received? and

(3) Whether the denial of credit based on case laws settled in the context of Rule 57Q of erstwhile Central Excise Rules, 1944 was correct or not in the facts and circumstances of the case?"

9. For answering the questions of law, it may be necessary to have a look at two provisions in the CENVAT Credit Rules and two definitions. Rule 4(1) of the CENVAT Credit Rules entitles a manufacturer to take credit in respect of the inputs, immediately upon the receipt of the inputs in the factory. Sub-rule (2) of Rule 4 of the Cenvat Credit Rules, 2002, speaks about Cenvat credit in respect of capital goods. Rule 4(2) reads as follows:

" Rule 4. Conditions for allowing CENVAT credit.-

(1) ....

(2) (a) The CENVAT credit in respect of capital goods received in

a factory at any point of time in a given financial year shall be taken only for an amount not exceeding fifty per cent. of the duty paid on such capital goods in the same financial year:

Provided that the CENVAT credit in respect of capital goods shall be allowed for the whole amount of the duty paid on such capital goods in the same financial year if the said capital goods are cleared as such in the same financial year.

(b) The balance of CENVAT credit may be taken in any financial year subsequent to the financial year in which the capital goods were received in the factory of the manufacturer, if the capital goods, other than components, spares and accessories, refractories and refractory materials and goods falling under heading No. 68.02 and sub-heading No. 6801.10 of the First Schedule to the Tariff Act, are in the possession and use of the manufacturer of final products in such subsequent years. "

10. It may be seen from a bare perusal of Rule 4(2) that the Rule speaks about (i) the circumstances under which a person is entitled to CENVAT Credit, and (ii) the manner in which such CENVAT Credit shall be availed. In its plain language, the said Rule does not talk about the date on which CENVAT Credit has to be taken, except indicating that CENVAT Credit shall be taken at any point of time in a given financial year.

11. Keeping the above in mind, we shall now turn our attention to Rule 6(4) which is actually couched in the negative. Rule 6(4) reads as follows:

" Rule 6. Obligation of manufacturer of dutiable and exempted goods.-

......

(4) No CENVAT credit shall be allowed on capital goods which

are used exclusively in the manufacture of exempted goods, other than the final products which are exempt from the whole of the duty of excise leviable thereon under any notification where exemption is granted based upon the value or quantity of clearances made in a financial year."

12. Unfortunately, Rule 6(4) uses a double negative. The first negative that is used in Rule 6(4) is that no CENVAT Credit shall be allowed on capital goods which are used exclusively in the manufacture of exempted goods. What follows the first part of the Rule 6(4) is the second negative, in the sense that the ineligibility to claim CENVAT Credit stipulated in the first part of Rule 6(4) is negatived or offset by what follows. It says that a claim for exemption from the whole of the duty of excise leviable under any notification where exemption is granted based upon the value or quantity of clearances made in a financial year, are not covered by the first part of Rule 6(4). In other words, the import of Rule 6(4) is that if there are final products which are exempt under any notification, where the notification for exemption is based upon

value or quantity of clearances made in a financial year, the CENVAT Credit will be allowed even on such goods, irrespective of the first part of Rule 6(4).

13. Therefore, the next question that we have to address ourselves is as to what are meant by capital goods and what are meant by final products. These two expressions are used in Rule 6(4).

14. Rule 2(b) of the Cenvat Credit Rules, 2002, defines the expression "capital goods" as follows:

> "Rule 2. Definitions.-
>
> In these rules, unless the context otherwise requires,-
>
> (a) ....
>
> (b) "capital goods" means,-
>
> (i) all goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90, heading No. 68.02 and sub-heading No. 6801.10 of the First Schedule to the Tariff Act;
>
> (ii) pollution control equipment
>
> (iii) components, spares and accessories of the goods specified at (i) and (ii) above;
>
> (iv) moulds and dies;
>
> (v) refractories and refractory materials;
>
> (vi) tubes and pipes and fittings thereof; and
>
> (vii) storage tank,
>
> used in the factory of the manufacturer of the final products, but does not include any equipment or appliance used in an office;"

15. Fortunately, there is no dispute in this case as to whether the goods received by the appellant were capital goods or not. It is an admitted fact that the appellant received capital goods during the period from April 2002 to March 2003. Therefore, with the accepted position that what was received by the appellant were capital goods, let us see what a final product is.

16. The expression "final product" is defined in Rule 2(e) to mean excisable goods manufactured or produced from inputs. What is clearly decipherable from the use of the expression "final product" and the definition of the expression "final product" is that the Rules do not make a distinction between a main product and a by-product. The Rules speak only about final products and not about main product or by-product.

17. Even in the show cause notice dated 07.4.2004, the Commissioner of Excise had admitted in paragraph 5.1 that certain by-products such as soap stock and wax get manufactured in the course of manufacture of the refined edible oils. But, unfortunately, the Commissioner chose to deprive the benefit of Rule 6(4) to the appellant, on the short ground that the total quantity of soap stock constitute only 2% to 2.5%, the total quantity of acid oil constitute 2.5% to 3% and the total quantity of wax produced constitute 0.6% to 1%. Therefore, in paragraphs 19.3 and 19.4 of the Order-in-original, the Commissioner disallowed the claim of the appellant even in respect of these by-products, perhaps obviously construing the expression "final product" to mean only a by-product.

18. There is no dispute about the fact that these three products, namely soap stock, acid oil and wax were dutiable even on the date on which the appellant received the capital goods, namely April 2002 to March 2003. This aspect has been completely overlooked by the Tribunal.

19. Coming to the decisions on which the Tribunal placed reliance, it is seen that the decision in Surya Roshni arose out of Rule 57Q(2) of the Central Excise Rules, 1944. As per the said Rule, the manufacturer of the final product was entitled to credit of duty paid on goods. This credit as per Rule 57R(1) can be availed as and when the capital goods were received by the manufacturer. The focus was on the date of receipt by the manufacturer. But, Rule 4(2)(a) of the 2002 Rules makes a clear departure. Therefore, the reliance placed upon Surya Roshni appears to be incorrect.

20. It appears that the decision of the Tribunal in Surya Roshni, was taken on appeal to the Supreme Court by the assessee. Though the Supreme Court dismissed the Special Leave Petition, the Supreme Court did not affirm the decision of the Tribunal on merits. The Supreme Court dismissed the appeal as not maintainable. As a consequence, Surya Roshni has again bounced back to the Madhya Pradesh High Court, which is now seized of the matter. We have seen the order passed by a Division Bench of the Madhya Pradesh High Court on 21.9.2012, which makes it clear that the very decision in Surya Roshni relied upon by the Tribunal has not attained finality. This is

apart from the fact that even if it attains finality, it would have no application to the case on hand.

21. In Binani Cements Ltd. relied upon by the Tribunal, the Delhi Bench of the Tribunal was once again concerned with the eligibility of a person under Rule 57Q of the old Modvat Rules. As we have stated earlier, the focus of the old Rules was actually on the date of receipt of the goods. In any case, Rule 6(4) never fell for consideration in Binani Cements Ltd.

22. Insofar as the decision in Grasim Industries Ltd. is concerned, the Tribunal was concerned in that case with an import made under the Project Import Scheme, in the context of Rule 57R. Therefore, the said decision followed the decision in Binani Cements Ltd. and hence, would have no application to the case on hand.

23. In Commissioner of Central Excise v. Sa urashtra Chemicals LTd. [2007 (212) ELT 7], the Supreme Court took note of the fact that under Rule 57Q(3), the manufacturer of a final product was entitled to credit of additional duty leviable under the Customs Tariff Act, 1975, on certain goods up to the extent of 75% of the additional duty. But, Rule 57Q was replaced by Rule 57AC with effect from 01.4.2000. These Rules permitted Cenvat Credit both in respect of inputs as well as in respect of capital goods, received in a factory, up to 50% in the same financial year in which the goods were received and the balance 50% in the subsequent financial year. But, the Supreme Court held that for the purpose of grant of Modvat Credit the law that was operating in the field at the relevant point of time had to be considered. Therefore, the application of the ratio in Grasim Industries to the law that prevailed at that time was approved. Nevertheless, the Supreme Court pointed out that the decision in Grasim Industries had become irrelevant after the new Rules had come into force.

24. Mr.A.P.Srinivas, learned Senior Panel Counsel relies upon a decision of a larger Bench of a Tribunal in Spenta International Ltd. v. CCE [2007 (216) ELT 133]. In that case, the issue that was referred to the Full Bench was whether CENVAT Credit eligibility has to be determined with reference to the dutiability of the final product on the date of receipt of the goods from the date of utilisation eligibility of 50% credit. For arriving at a decision on the said issue, the larger Bench followed Surya Roshini, without even taking note of the fact that the decision in Surya Roshini is still at large before the Madhya Pradesh High Court. In any case, the interpretation to be given to Rule 6, was not even considered by the larger Bench in Spenta International. Hence, it has no application.

25. Yet another decision relied upon by Mr.A.P.Srinivas, learned Standing Counsel is the one in Commissioner of Central

Excise v. Samsung India Electronics Ltd. [2014 (309) ELT 593]. In that case, the Allahabad High Court was concerned with a question whether the CENVAT Credit of capital goods taken by the respondents, which are exclusively used in the manufacture of exempted goods, was admissible or not. As seen from the facts out of which the said case arose, there were actually two companies in question. One was Samsung Electronics India Information and Telecommunication Ltd. It was engaged in the manufacture of colour monitors and CTV Chassis on job works. This company later amalgamated with Samsung Electronics India Ltd. The former was undertaking job work for the latter. Therefore, the question that arises for consideration in this appeal did not even arise for consideration in the case before the Allahabad Division Bench.

26. Coming to the core issue on hand, as we have pointed out earlier, the expression "financial year" appearing in Rule 4(2)(a) cannot be rendered redundant or nugatory. The capital goods were received admittedly during the financial year 2002-03. The main final product, namely refined edible oil was exempt from payment of duty only up to 28.02.2003 during the financial year 2002-03. The goods became dutiable with effect from 01.3.2003. Additionally, all the three by-products were not exempt from payment of duty during any part of the financial year 2002-03. Rule 4(2)(a) is not worded as follows:

> "CENVAT Credit shall be availed with reference to the date of receipt of the capital goods."

The Rule simply states that CENVAT Credit shall be availed in respect of capital goods received in a factory at any point of time in a given financial year. In other words, if a factory is manufacturing goods which are dutiable, the date on which a person receiving capital goods is entitled to claim CENVAT Credit, is left to his choice. He is entitled to take any date within the financial year subject only to the first condition imposed under Rule 6(4), namely that on the date on which he avails credit, the goods to be manufactured out of them should not be exempted goods. This is the proper manner of construction of Rule 4(2)(a) and 6(4).

27. The consequences of giving a different interpretation to the Rule is too obvious. Take for instance a case where the factory receives capital goods on a particular day, say for instance 01.10.2003. If the goods are dutiable goods on the date of receipt, namely 01.10.2003, the Department agrees that the factory will be entitled to CENVAT Credit. Suppose an exemption notification is issued on the date following the date of receipt of capital goods, he will still be entitled to the benefit of CENVAT Credit. Therefore, to interpret Rule 4(2)(a) in a manner that will benefit a person, who receives the capital goods on

the date, on which, the goods to be manufactured were dutiable, despite the same goods becoming exempted goods on the next day, but to deprive the benefit to a person, who manufactures dutiable goods on the basis of the capital goods received in a particular financial year, would not be a proper interpretation to the Rules.

28. In any case, as we have pointed out earlier, the denial of the benefit of Rule 6(4) has been done in this case only on the basis that the by-products constitute a very negligible quantity. The Rules do not speak about by-product anywhere. The Rules speak only about a final product. We have extracted the definitions of the expression "final product" earlier. Therefore, we are of the considered view that the Tribunal has not addressed this issue. Hence, the questions of law are answered in favour of the assessee and the appeal is allowed. No costs.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

To

1. The Registrar,
Customs, Excise and Service Tax
Appellate Tribunal, South Zonal Bench
Chennai, Shastri Bhavan Annex
Haddows Road, Chennai 600 006.

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Chennai III, No.121, Nungambakkam High Road
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C.M.A.No.2092 of 2007.

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