IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 18.06.2015

CORAM

THE HONOURABLE MR. JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MS. JUSTICE K.B.K.VASUKI

C.M.A. No. 285 of 2007

C.T.Accepted as per order
dt. 18.10.2006 made in MP.1/2006 in CMA SR.1706/06

The Commissioner of Central Excise,
Pondicherry Commissionerate,
No.1, Goubert Avenue, Beach Road,
Pondicherry - 605 001. .. Appellant

- Vs -

1. M/s.Advance Detergents Ltd.,
Pallithennai Post,
Mangalam Road, Kandamangalam,
Pondicherry.

2. Customs, Excise and Service Tax
Appellate Tribunal, South Zonal Bench,
Shastri Bhawan Annexe, 1st Floor,
Haddows Road, Chennai - 600 006.
.. Respondents

Appeal filed under Section 35G of the Central Excise Act, 1944 against the order dated 10.06.2005 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, made in Final Order No.892 to 894 of 2005.

For Appellant : Mr.A.P.Srinivas
For Respondents: Mr.P.R.Renganath
for M/s.Raghavan

J U D G M E N T
(DELIVERED BY R.SUDHAKAR, J.)

Aggrieved by the order passed by the Tribunal in dismissing the appeal filed by the Revenue, the Revenue/appellant is before this Court by filing the present appeal. This Court, vide order dated 06.02.2007, while admitting the appeal, framed the following substantial question of law for consideration:

"Whether Tribunal order is correct in rejecting the recovery of Modvat Credit attributable to the inputs relating to final product cleared under the exempted category under Rule 57C of Central Excise Rules, 1944?"

2. The first respondent/assessee is engaged in the business of manufacturing Linear Alkyl Benzene Sulphoric Acid (LABSA) falling under chapter sub heading 3402.90 of the Central Excise Tariff Act, 1985. They were availing facilities under Rule 57G and the declared inputs were Linear Alkyl Benzene and Sulphuric Acid. In the course of manufacture of Acid Slurry, Spent Sulphuric Acid is obtained as by-product. The assessee had cleared Spent Sulphuric Acid partly on payment of duty and partly under exemption in terms of Notification No.8/96-CE dated 23.7.1996 and Notification No.4/97-CE dated 1.3.97. The Department invoking Rule 57C alleged that the credit of duty taken on the inputs was not admissible if the final product was cleared at 'nil' rate of duty and hence the credit taken on Sulphuric Acid, which was used to obtain the Spent Sulphuric Acid was liable to be reversed. Hence, three show cause notices were issued to the assessee to show cause as to why the credit should not be disallowed. The Original Authority, after due process of law, disallowed the credit on the ground that they had cleared Spent Sulphuric Acid without payment of duty by claiming exemption under the said Notification and therefore, the proportionate credit taken on the inputs had to be expunged as per Rule 57C of the Central Excise Rules, 1944.

3. Aggrieved by the said order of the Original Authority, the assessee filed an appeal before the Commissioner (Appeals) contending that the Spent Sulphuric Acid was a by-product and not final product and it was cleared partly on payment of duty and partly without payment of duty in accordance with the procedure prescribed under Chapter X by invoking Notification No.8/96-CE dated 23.7.1996 and Notification No.4/97-CE dated 1.3.97.

4. The Commissioner (Appeals) after discussing the issue at length relied upon the decisions in the case of Varuna Sulphonators Pvt. Ltd. V. UOI (1993 (68) ELT 42 (Allahabad) and Jaydee Agro Chemicals Private Ltd. (1996 (84) ELT 354) and came to the conclusion that the argument of the lower authority that Spent Sulphuric Acid was not a by-product or waste or residue was therefore, not tenable.

5. With regard to the credit of duty required to be reversed in respect of Sulphuric Acid contained in the Spent Sulphuric Acid, which has been cleared without payment of duty by availing exemption under Notification 8/96-CE dated 23.7.1996 and Notification No.4/97-CE dated 1.3.97, the Commissioner (Appeals), by placing reliance on the decisions in the case of Tamil Nadu Industrial Explosives Ltd.

(1996 (14) RLT 479) and in the case of Sarchem Surfactanta Pvt.Ltd. (1996 (87) ELT 105), held as follows:

> "5. As regards whether credit of duty is required to be reversed in respect of Sulphuric acid contained in the Spent Sulphuric acid which they had cleared without payment of duty by availing exemption under Notification No.8/96-CE and 4/97-CE, no such duty is required to be reversed under the provisions of Sub-rule (1) of Rule 57D which lays down that the credit of duty allowed in respect of any inputs shall not be denied or varied on the ground that part of the inputs is contained in any waste, refuse or by-product arising during the course of manufacture of final product whether or not such waste, refuse or by-product is exempt from the whole of the duty of excise leviable thereon or is chargeable to nil rate of duty or is not specified as final product under Rule 57A. In view of the above specific provisions, credit of duty cannot be denied in respect of Sulphuric Acid which was used in the manufacture of Acid Slurry and during the course of such manufacture Spent Sulphuric Act was obtained as a by-product. Therefore, the credit of duty disallowed by the lower authority on Sulphuric Acid which was used in the manufacture of Acid Slurry and where Spent Sulphuric Acid was also obtained as a by-product, is not legally correct and in this connection I rely on the decisions of CEGAT in the case of Tamil Nadu Industrial Explosives Ltd., [1996 (14) RLT 479 (CEG-SRB)] and in the case of Sarchem Surfactants Pvt. Ltd., [1996 (87) ELT 105] wherein it has been held that Rule 57D clearly envisages that credit of duty cannot be denied or varied on the ground that some inputs is contained in any waste, refuse or by-product arising during the manufacture of final product whether or not such waste, refuse or by-product is exempt from the whole of duty of excise leviable thereon or is chargeable to nil rate of duty."

6. Aggrieved by the above-said order of the Commissioner (Appeals), the Revenue preferred an appeal before the Tribunal. Before the Tribunal, both the Department as well as the assessee conceded that the issue has been covered by the decision of the Tribunal in Final Order No.390-399/05 dated 10.3.2005 and Final Order No.543-545/05 dated 30.3.2005. Accordingly, the Tribunal following the decisions of the Tribunal dismissed the appeal filed by the Revenue holding as follows:

> "5. The ratio of our earlier decision can be had from para-3 of Final Order No.390-399/05 ibid which is produced herein below:
>
> > "3. Admittedly, LABSA was a dutiable product and the same was cleared on payment of duty by the assessee during the material period. In so far as the SS Acid is concerned, it is now settled that it is

an excisable by-product emerging in the process of manufacture of excisable final product and, therefore, input duty credit is not deniable in relation to SS Acid vide the Tribunal's larger bench decision in Collector Vs. Keti Chemicals, 1999 (113) ELT 689, and the Allahabad High Court's decision in Varuna Sulphanators (supra) was followed by the Tribunal in Southern Petrochemical Industries Vs. CCE Madras, 2002 (148) ELT 1012 (Tri - Chennai) and that the Civil Appeal filed by M/s.Southern Petrochemical Industries against the Tribunal's decision was dismissed by the Supreme Court vide 2003 (152) ELT A 96 (SC). When both the main product and the by-product were dutiable, the assessee was eligible for input duty credit on the entire quantity of 98% Sulphuric Acid and it was not open to the department to ask them to reverse any part of such credit already taken. We, therefore, do not find any merit in the Revenue's appeals, which are dismissed."

6. Following the above decision we sustain the impugned orders and reject the appeals of the Revenue."

7. Aggrieved by the order of the Tribunal, the Department is before this Court by filing the present appeal raising the above-mentioned question of law.

8. Mr.A.P.Srinivas, learned Standing Counsel appearing for the appellant submits that the Spent Sulphuric Acid is a final product and is marketable and therefore, no credit of duty should be allowed. He further contends that Rule 57D does not apply to the facts of the present case as the commodity Spent Sulphuric Acid is a fully manufactured product and is a separate chemically defined compound having separate classification. Therefore, the assessee is not entitled for Modvat Credit in respect of Spent Sulphuric Acid cleared without payment of duty.

9. Learned counsel appearing for the first respondent/assessee submitted that before the Tribunal, when the Department itself have conceded that the issue is covered by the decision of the Tribunal, the Department cannot now claim that credit availed by the assessee was not admissible. Further more, in the case of Union of India V. Hindustan Zinc Ltd., the Supreme Court held that Sulphuric acid was only a by-product and the conversion of sulphur dioxide to sulphuric acid could not elevate sulphuric acid to the status of final product and hence, the assessee is entitled for Modvat Credit.

10. Heard learned Standing Counsel appearing for the appellant and the learned counsel appearing for the first respondent/assessee and perused the materials placed before this Court.

11. The issue whether the Spent Sulphuric Acid is a by-product or not has been put to rest by the Allahabad High Court in the case of Varuna Sulphonators Pvt. Ltd. V. Union of India (1993 (68) ELT 42 (All) and also by the Supreme Court in the recent decision in the case of Union of India v. Hindustan Zinc Ltd. 2014 (303) ELT 321 (SC).

12. The Supreme Court in the case of Union of India v. Hindustan Zinc Ltd. 2014 (303) ELT 321 (SC), while dealing with the entitlement of the assessee to Modvat/Cenvat Credit for the use of inputs in the manufacture of final products which are exempt or subject to nil rate of duty, held as follows:

> "16. Before we advert to the interpretations of the aforesaid provisions and to discuss the argument of the Union of India as to whether literal interpretation is to be given to Rule 57CC, it would be necessary to understand the properties of sulphuric acid. From what is explained above including the use of sulphuric acid for the production of zinc, it becomes apparent that sulphuric acid is indeed a by-product. In fact, it is so treated by the respondents in their balance sheet as well as various other documents which were filed by the respondents in the courts below. It is also a common case of the parties that Hindustan Zinc Limited and Birla Copper were established to produce zinc and copper respectively and not for the production of sulphuric acid. It was argued by the learned Counsel for the respondents, which could not be disputed by the learned Solicitor General, that emergence of sulphur dioxide in the calcination process of concentrated ore is a technological necessity and then conversion of the same into sulphuric acid as a non-polluting measure cannot elevate the sulphuric acid to the status of final product. Technologically, commercially and in common parlance, sulphuric acid is treated as a by-product in extraction of non-ferrous metals by companies not only in India but all over the world. That is the reason why the department accepted the position before the Tribunal that sulphuric acid is a by-product. In these circumstances the position taken now by the appellant that sulphuric acid cannot be treated as a by-product cannot be countenanced. Mr. S.K. Bagaria, learned Senior Counsel appearing for the respondent while explaining the manufacturing process in detail, also pointed out that the ore concentrates (Zinc or Copper) are completely utilised for the production of zinc and copper and no part of the metal, zinc or copper forms part of the sulphuric acid which is cleared out. It was submitted that the extraction of zinc from the ore concentrate will inevitably result in the emergence of sulphur dioxide as a technological necessity. It is not as though the respondents can use lesser quantity of zinc concentrate only to produce the metal and not produce

sulphur dioxide. In other words, a given quantity of zinc concentrate will result in emergence of zinc sulphide and sulphur dioxide according to the chemical formula on which respondents have no control."

13. A reading of the above-said decision of the Supreme Court makes it clear that the invocation of Rule 57C by the Department is not justified and the Commissioner (Appeals) and the Tribunal were correct in holding in favour of the assessee.

14. Insofar as Rule 57D is concerned, the very language of Rule 57D makes it clear that credit of duty shall not be denied or varied on the ground that part of the inputs contained in any waste, refuse or by-product arising during the manufacture of the final product, or that the inputs have become waste during the course of manufacture of the final product. It also states that it is of no consequence whether the by-product such as waste, refuse or by-product is exempt from the whole of the duty of excise leviable thereon or chargeable to nil rate of duty or is specified as a final product.

15. In the present case, as the Spent Sulphuric Acid is not a final product, as has been held in the decision of the Supreme Court and assuming it is a waste, refuse or by-product, it is chargeable to nil rate of duty, Rule 57D provides for taking credit.

16. There is yet another factor which needs to be considered is that part of the Spent Sulphuric Acid, which is a by-product in the manufacture of the final product, namely, Acid Slurry, is cleared on payment of duty and part of it is cleared at nil rate of duty under Chapter X procedure in terms of Notification No. 8/96-CE dated 23.7.1996 and Notification No.4/97-CE dated 1.3.97. Therefore, the provisions of Rule 57D get squarely attracted to the present case and the Department shall not deny the credit of specified duty whether or not such waste or refuse is exempt from whole of the duty of excise leviable thereon or chargeable to nil rate of duty.

17. In view of the above, following the above-said decision of the Supreme Court in the case of Union of India v. Hindustan Zinc Ltd. 2014 (303) ELT 321 (SC), we have no hesitation to uphold the order of the Commissioner (Appeals), which was confirmed by the Tribunal.

18. In the result, we answer the question of law in favour of the assessee and against the Revenue and consequently, this Civil Miscellaneous Appeal stands dismissed. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

sl

To

1.Customs, Excise & Service Tax Appellate Tribunal
South Zonal Bench Shastri Bhavan Annexe
1st Floor, No.26, Haddows Road, Chennai 600 006.

+1cc to Mr.R. Raghavan, Advocate, S.R.No.30500

KU(CO)
EU(13/07/2015)

C.M.A. NO.285 of 2007