IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 12.06.2015

CORAM

THE HONOURABLE MR. JUSTICE R.SUDHAKAR

AND

THE HONOURABLE MS. JUSTICE K.B.K.VASUKI

C.M.A. NO. 3273 OF 2009

Commissioner of Central Excise
Puducherry Commissionerate
Goubert Avenue, Beach Road
Puducherry 605 001. ..Apellant/Respondent

- Vs -

1. Customs, Excise & Service
   Tax Appellate Tribunal
   South Zonal Bench
   Shastri Bhavan Annexe-I
   1st Floor, 26, Haddows Road
   Chennai 600 006. ..Respondent

2. M/s.Pepsico India Holdings (P) Ltd.
   No.6, GST Road
   Mamandur
   Madurantagam 603 111. .. Respondents/Applicant

Appeal filed under Section 35-G of the Central Excise Act against the order dated 14.03.2008 passed by the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Chennai, made in Final Order No.240/2008.

For Appellant : Mr. K.Mohanamurali

For Respondents : Mr. Parthasarathy for M/s.Lakshmi Kumaran for R-2

JUDGMENT

(DELIVERED BY R.SUDHAKAR, J.)

Aggrieved by the order of the Tribunal in allowing the appeal filed by the assessee, the appellant/Revenue is before this Court by filing the present appeal. Vide order dated 4.12.2009, this Court, while admitting the appeal, framed the following substantial question of law for consideration :-

"Whether the Tribunal is justified in allowing the appeal when Rule 57CC (1) of Central Excise Rules, 1944 is straight away attracted and when sub-rule (9) is not complied with?"

2. The facts, in a nutshell, are as hereunder :-

The respondent is a manufacturer of aerated water drinks and fruit juice based drinks and is subjected to 'Nil' rate of duty under Chapter 22 of the Central Excise Tariff. The respondent took Cenvat credit on various inputs used in the manufacture of aerated water and Lehar Slice, viz., (i) Sugar (to prepare sugar syrup), (ii) activated carbon (for water purification), (iii) caustic soda (for water purification), (iv) filter paper (for filtration), (v) furnace oil (fuel for generation of electricity) and (vi) industrial washing products. The respondent had taken Modvat credit on the common inputs, viz., activated carbon, caustic soda and filter paper with effect from 1.9.1996.

3. With regard to the common inputs, viz., activated carbon, filter paper and caustic soda, the respondent took cenvat credit only for the month of September, 1996, to the extent of Rs.33,050/= which was subsequently reversed on 17.10.96 and this fact is not disputed. The respondent did not avail any cenvat credit after September, 1996 on all the aforementioned common inputs.

4. In respect of furnace oil used for generation of electricity, the following pro rata amounts were paid towards the exempted Lehar Slice :-

Amount	Date of Payment	Period
13854	100397	9/96 and 10/96
1786	100397	11/96
23905	100397	12/96 to 2/97
39545	100397	9/96 to 2/97

The entire modvat credit on the quantity of common inputs stood subsequently reversed.

5. As regards sugar, which input is common for both dutiable aerated water and exempted Lehar Slice, the respondent maintained separate accounts and took cenvat credit only on that quantity of sugar used in dutiable products, which fact is also not in dispute.

6. It is the case of the department that the respondent had used the common cenvat credit availed inputs in the manufacture of dutiable aerated water and duty exempted slice, but did not follow the procedure contemplated under Rule 57CC (9) by maintaining separate inventory and accounts in the receipt and use of inputs, viz., filter paper, activated carbon, caustic soda, industrial washing products and sugar. Further, in respect of furnace oil used as fuel, the respondent did not reverse the credit equal to the furnace oil said to have been used in the manufacture of exempted Slice. Therefore, the assessee/respondent is liable to pay an amount equal to 8% of the value of exempted produce under Rule 57CC. Therefore, a show cause notice was issued on the assessee/respondent demanding payment of duty.

7. A reply was issued by the assessee/respondent to the show cause notice stating that they had reversed the entire credit on the common inputs used in the manufacture of dutiable as well as exempted goods and, therefore, no demand should be made. However, the said submission was rejected by the adjudicating authority, who in his original order of adjudication, confirmed the demand of duty at 8% of the value of clearance. Against the said adjudication order, the assessee preferred appeal before the Commissioner (Appeals), who dismissed the appeal.

8. On further appeal before the Tribunal, the Tribunal reversed the order of the Commissioner (Appeals) placing reliance on the decision of the Allahabad High Court in Hello Mineral Water Pvt. Ltd. - Vs - Union of India (2004 (174) ELT 422 (All.)) which was passed on the basis of the Apex Court's decision in Chandrapur Magnet Wires Pvt. Ltd. - Vs - Collector (1996 (81) ELT 3 (SC)). Aggrieved against the said order, the appellant/Revenue is before this Court by filing the present appeal.

9. Heard the learned standing counsel appearing for the appellant/Revenue and the learned counsel appearing for the respondent/assessee and perused the materials available on record as also the decisions relied on by the learned counsel on either side.

10. When the matter was taken up, it is brought to the notice of this Court that by Finance Act, 2010, an amendment was made to Rule 6 under Section 73 of the Finance Act, 2010, which came into operation with retrospective effect from September, 2004. Sub-rule (6) to Rule 6 was introduced therein, which provided as hereunder :-

S No.	Provisions of Cenvat Credit Rules, 2004 to be amended	Amendment	Period of effect of amendment
1	2	3	
	Rule 6 of the Cenvat Credit Rules, 2004 as published vide Notification Number G.S.R. 600 (E), dated the 10th September, 2004 [23/2004-CENTRAL EXCISE (N.T.), dated the 10th September, 2004].	In the Cenvat Credit Rules, 2004, in Rule 6, after sub-rule (6), the following sub-rule shall be inserted, namely : "(7) Where a dispute relating to adjustment of credit on inputs or input services used in or in relation to exempted final products relating to the period beginning on the 10th day of September, 2004 and ending with the 31st day of March, 2008 (both days inclusive) is pending on the date on which the Finance Bill, 2010 receives the assent of the President, then, notwithstanding anything contained in sub-rules (1) and (2), and clauses (a) and (b) of sub-rule (3), a manufacturer availing Cenvat credit in respect of any inputs or input services and manufacturing final products which are chargeable to duty and also other final products which are exempted goods, may pay an amount equivalent to Cenvat credit attributable to the inputs or input services used in, or in relation to the manufacture of, exempted goods before or after the clearance of such goods : Provided that the manufacturer shall pay interest at the rate of twenty-four per cent, per annum from the due date till the date of payment of the said amount. Explanation : For the purpose of this sub-rule, "due date" means the 5th day of the month following the month in which goods have been cleared from the factory.	10th day of September, 2004 to the 31st day of March, 2008 (both days inclusive).

11. Rule 57CC, on which reliance is placed by the learned counsel for the appellant, was introduced with effect from

01.09.1996. As per the said provision, where a manufacturer is engaged in the manufacture of any final product, which is chargeable to duty as well as in any other final product, which is exempt from the whole of the duty of excise leviable thereon, or is chargeable to nil rate of duty and the manufacturer takes credit of the inputs used in the manufacture of both exempted and dutiable final products, the manufacturer shall pay 8% of the price of exempted products unless separate books of accounts are maintained as per sub-rule (9) of Rule 57CC.

12. It is clear from a plain reading of Rule 57CC that where a manufacturer is engaged in the manufacture of any final product, which is chargeable to duty as well as in any other final product, which is exempt from the whole of the duty of excise leviable thereon, or is chargeable to nil rate of duty, if the manufacturer takes credit of the inputs used in manufacture of both exempted and dutiable final products, in the absence of the manufacturer maintaining separate books of accounts as required under sub-rule (9) of Rule 57CC, the manufacturer is liable to pay 8% of the price of exempted products.

13. For claiming the benefit under Section 57CC (9) of the Act, the manufacturer has to maintain separate books of accounts, sub-section (2) to Section 73 of the Finance Act, 2010 mandates that the assessee has to make an application to the Commissioner of Central Excise along with documentary evidence and a Certificate from the Chartered Accountant or a Cost Accountant, certifying the amount of input credit attributable to the inputs used in or in relation to the manufacture of exempted goods within a period of six months from the date on which the Finance Bill, 2010 received the assent of the President. However, in the present case, even as per the show cause notice and the order of adjudication, it is clear that the input credit has been reversed by the respondent/assessee even prior to the amendment. In such view of the matter, the Tribunal, following the decision of the Allahabad High Court in Hello Mineral Water case (supra), which followed the decision of the Apex Court in Chandrapur Magnet Wires case (supra) rightly set aside the demand.

14. Similar order has been passed by this Court in the case of CCE - Vs - ICMC Corporation Ltd. (2015 (315) ELT 388 (Mad.)), wherein it has been held as hereunder :-

> "4. We find from a reading of the amendment made to Rule 6 under Section 73 of the Finance Act, 2010 that the procedure of the Cenvat Credit Rules under Rule 6 was brought in with retrospective effect from September, 2004 by insertion under Rule 6(6), which reads as under :

S. No.	Provisions of Cenvat Credit Rules, 2004 to be amended	Amendment	Period of effect of amendment
1	2	3	4
	Rule 6 of the Cenvat Credit Rules, 2004 as published vide Notification Number G.S.R. 600 (E), dated the 10th September, 2004 [23/2004-CENTRAL EXCISE (N.T.), dated the 10th September, 2004].	In the Cenvat Credit Rules, 2004, in Rule 6, after sub-rule (6), the following sub-rule shall be inserted, namely : "(7) Where a dispute relating to adjustment of credit on inputs or input services used in or in relation to exempted final products relating to the period beginning on the 10th day of September, 2004 and ending with the 31st day of March, 2008 (both days inclusive) is pending on the date on which the Finance Bill, 2010 receives the assent of the President, then, notwithstanding anything contained in sub-rules (1) and (2), and clauses (a) and (b) of sub-rule (3), a manufacturer availing Cenvat credit in respect of any inputs or input services and manufacturing final products which are chargeable to duty and also other final products which are exempted goods, may pay an amount equivalent to Cenvat credit attributable to the inputs or input services used in, or in relation to the manufacture of, exempted goods before or after the clearance of such goods : Provided that the manufacturer shall pay interest at the rate of twenty-four per cent, per annum from the due date till the date of payment of the said amount. Explanation : For the purpose of this sub-rule, "due date" means the 5th day of the month following the month in which goods have been cleared from the factory.	10th day of September, 2004 to the 31st day of March, 2008 (both days inclusive).

As per Section 73 sub-section (2) of the Finance Act, 2010 the assessee has to make an application to the Commissioner of Central Excise along with documentary evidence and a Certificate from the Chartered Accountant or a Cost

Accountant, certifying the amount of input credit attributable to the inputs used in or in relation to the manufacture of exempted goods within a period of six months from the date on which the Finance Bill, 2010 received the assent of the President.

5. Considering the fact that the assessee had reversed the credit even prior to the amendment and the order of the Tribunal is in fact no different from what is contemplated under the Finance Act, 2010, we do not find anything survives further for this Court to consider the merits of the case pleaded by the Revenue."

15. In view of the decisions cited supra, the case on hand is squarely covered by the abovesaid decisions. Accordingly, the substantial question of law is answered against the Revenue and in favour of the assessee.

16. For the reasons stated above, this appeal fails and the same is dismissed. In the circumstances of the case, there shall be no order as to costs.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

To

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

2. Customs, Excise & Service
Tax Appellate Tribunal
South Zonal Bench
Shastri Bhavan Annexe-I
1st Floor, 26, Haddows Road
Chennai 600 006.

+1 cc to Mr.Lakshmi Kumaran counsel for 2nd Respondent sr.no.29166.

C.M.A. NO. 3273 OF 2009

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