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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CENTRAL EXCISE APPEAL NO.88 OF 2007

Ruby Mills Limited ...Appellant
vs.
The Commissioner of Central
Excise Mumbai IV ...Respondent

Mr.V.Sridharan, Senior Advocate a/w Mr.Prakash Shah and Mr.Jas Sanghvi i/b PDS Legal for the appellant
Mr.Pradeep Jetly a/w Mr.Jitendra Mishra for the respondent

CORAM : A.S.OKA, &
A.K.MENON,JJ.
DATE : OCTOBER 30, 2017

ORAL JUDGMENT: (PER A.S.OKA,J.)

1 The submissions of the learned senior counsel for the appellant and the learned counsel for the respondent were heard on 12th October 2017. On 13th October 2017 which was the last working day of the Diwali Vacation, on account of paucity of time, the Judgment could not be dictated, and therefore, the appeal is kept today for dictation of Judgment.

2 With a view to appreciate the submissions made on behalf of the learned counsel for the parties, it will be necessary to make a brief reference to the facts of the case.

3 The appellant-assessee has taken an exception by way of this Appeal under section 35G of Central Excise Act,1944 (for short “the said Act”) to the

impugned Judgment and order passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Mumbai (for short `the Appellate Tribunal').

4 The appellant-assessee was having a factory/mill at Dadar,Mumbai which consisted of spinning, weaving and processing plants. It is the case made out by the appellant-assessee that a common registration was obtained for the said plant at Dadar, Mumbai under the provisions of the Rule 174 of the Central Excise Rules,1944 (for short “the said Rules”). According to the case made out by the appellant-assessee, the spinning plant was shifted from Dadar unit to village Dhamni in District Raigad. By a letter dated 13th May 2002, the appellant informed the Assistant Collector about the shifting and requested him to transfer the unutilised credit of additional duty on textile and textile articles lying as on 30th April 2002 to unit at Dhamni. According to the case of the appellant, it was availing benefit of CENVAT credit of duty paid on fibres for use in the manufacture of yarn. According to the case of the appellant, spinning plant along with complete stock of inputs, capital goods and plant and machinery were shifted to unit at village at Dhamni.

5 By a letter dated 16th September 2002, the said application made on 18th May 2002 was rejected by the Deputy Commissioner, Central Excise. According to the case of the appellant, he was not given an

opportunity of being heard to the appellant and therefore, the second application was made 17th January 2004. The request made therein was for transfer of unutilised balance of additional duty of textile and textile articles lying in balance as on 31st December 2003 from the Dadar Unit to Dharni Unit. On 15th March 2004, a show cause notice was issued calling upon the appellant to show cause as to why the application for transfer of unutilised credit from Dadar to Dhamni unit should not be rejected on the ground that entire factory was not transferred as required by Rule 8 of Cenvat Credit Rules,2002 (for short "the Cenvat Rules").

6 After hearing the appellant, by order dated 19th March 2004, the Assistant Commissioner of Central Excise rejected the application made by the appellant on 17th January 2004. Being aggrieved by the said order, an appeal was preferred by the appellant under section 35 of the said Act before the Commissioner of Central Excise (Appeals). By order dated 19th January 2005, the First Appellate Authority allowed the appeal and directed to grant of cash refund of entire unutilised balance unit. On 1st April 2005, a show cause notice was issued to the appellant calling upon the appellant to show cause as to why the refund of central excise should not be rejected on the ground that unutilised balance cannot be refunded in cash. After considering the reply filed by the appellant to the show cause notice, by order dated 12th May 2005 the Assistant Commissioner rejected the cash refund on

the ground that the whole factory was not transferred to Dhamni as required by Rule 8 of the CENVAT Rules. The order dated 19th January 2005 passed by the Commissioner (Appeals) was challenged by the respondent-revenue by preferring an appeal to the Appellate Tribunal. Being aggrieved by the order dated 12th May 2005, the appellant preferred an appeal before the Commissioner of Central Excise. By order dated 29th September 2005, the Commissioner (Appeals) allowed the appeal by observing that the order dated 12th May 2005 passed by the Assistant Commissioner was against judicial discipline and was void. Against the said order, the respondent-revenue preferred an appeal before the Appellate Tribunal.

7 In the meanwhile, by order dated 4th January 2006, the Assistant Commissioner of Central Excise allowed the transfer of CENVAT credit to the extent of Rs.50,45,594.07 and rejected the prayer for transfer of balance unutilised unit of Rs.45,92,199/-. This order was again subjected to a challenge by the appellant by preferring an appeal before the First Appellate Authority which was disposed of by order dated 1st November 2006.

8 By the impugned order, the aforesaid appeals preferred by the respondent-revenue were allowed by the Appellate Tribunal on the ground that the entire factory was not shifted by the appellant to Dhamni and therefore, Rule 8 of the CENVAT Rules will not apply.

9 This Appeal was admitted by order dated 13th March 2008 on the substantial questions of law formulated in paragraph 32 of grounds of appeal. Substantial questions of law in paragraph 32 read thus:

> "(a) Whether the Tribunal was right in holding that the Appellants are not entitled to transfer of unutilized credit under Rule 8 of the Cenvat Credit Rules,2002?
> (b) Whether Rule 8 of the Cenvat Credit Rules 2002 contemplates transfer of credit only in the case of shifting of the whole registered factory or any one of the plants of composite units having common Central Excise Registration?
> (c)Whether the Tribunal was right in emphasizing on registration to construe the meaning of the term "factory"?

10 The learned senior counsel for the appellant has taken us through the impugned Judgment and order. He also invited our attention to sub-rule 1 of Rule 8 of the CENVAT Rules. Sub-rule 1 of Rule 8 talks about shifting of factory by manufacturer. He invited our attention to definition of factory in clause (e) of sub-section 2 of the said Act. He submitted that the factory includes any part of factory in which excisable goods are manufactured. He submitted that a part of factory will be also covered by sub-rule 1 of Rule 8 of the CENVAT rules.

He invited our attention to Rules 57A to 57G of Central Excise Rules,1944 and amended Rules 57F and 57G. He submitted that on plain reading of Rule 8 of the Cenvat Rules, it is crystal clear that transfer of entire factory is not at all contemplated. He pointed out that the entire division/unit from Dadar factory has been already transferred to Dhamni. He submitted that if definition of factory under Rule 8 of the Cenvat Rules and the said Act is considered, the word `factory' cannot be given different meaning. He also referred to the decision of the Apex Court in the case of J.K.Spinning And Weaving Mills Limited Vs. Union of India[1]. He would therefore submit that the view taken by the Appellate Tribunal is completely erroneous. The learned counsel for the respondent supported the impugned Judgment and order by pointing out that on plain reading of Sub-Rule 1 of Rule 8 of the CENVAT Rules, unless the entire factory is shifted to another site, Rule 8 cannot be applied. He would submit that no interference is called for in the Judgment and order.

11 We have given careful consideration to the submissions. Firstly, it will be necessary to make a reference to Rule 8 of CENVAT Rules which reads thus:

"RULE 8. Transfer of CENVAT credit-

(1) If a manufacturer of the final products shifts his factory to another site or the

1 1987 (32) E.L.T 234 (SC)

factory is transferred on account of change in ownership or on account of sale, merger, amalgamation, lease or transfer of the factory to a joint venture with the specific provision for transfer of liabilities of such factory, then, the manufacturer shall be allowed to transfer the CENVAT credit lying unutilized in his accounts to such transferred, sold, merged, leased or amalgamated factory.

(2) The transfer of the CENVAT credit under sub-rule (1) shall be allowed only if the stock of inputs as such or in process, or the capital goods is also transferred alongwith the factory to the new site or ownership and the inputs, or capital goods, on which credit has been availed of are duly accounted for to the satisfaction of the Commissioner."

12 Sub Rule 1 of Rule 8 is applicable when the manufacturer of final products shifts his factory or the factory is transferred on account of change in ownership. The benefit of transfer of CENVAT credit lying unutilised is permissible in such cases. The question which arises for consideration is whether Sub-Rule 1 of Rule 8 requires transfer of the entire factory to another site or it is applicable even to a transfer of a part of the activity undertaken in the factory.

13 We have perused the application/letter dated 18th May 2002 made by the appellant to the Central

Excise. The first two paragraphs of the said letter read thus:

> "This is to inform you that <u>we have closed down our Spinning Section at Dadar Unit and certain machineries of spinning and cone winding are shifted /to be shifted to our spinning unit at Dhamni</u>.
>
> We shall be transferring yarn manufactured at our Dhamni unit to Dadar for manufacturing of grey and processed fabric. Processed fabric will be cleared for home consumption and exports from Dadar unit."
>
> (Underline added)

14 Thus, it is very clear that the appellant came out with the case that the activity of only the spinning unit at Dadar has been stopped and has been shifted to its spinning unit at Dhamni. There is a specific statement that yarn manufactured at Dhamni will be transferred to unit at Dadar for manufacturing of grey and processed fabric. The processed fabric will be cleared and sold for home consumption and exports from Dadar unit. Thus, the letter dated 18th May 2002 makes it very clear that only a part of the activity of manufacture of final product of grey and processed fabric has been transferred to the unit at Dhamni. Thus, only a part of manufacturing activity has been transferred from Dadar unit to Dhamni unit and the yarn manufactured at Damni is again brought back to Dadar for the purposes of manufacturing of grey and processed

fabrics.

15 Rule 8 forms a part of CENVAT Rules. On plain reading of Sub-Rule 1 of Rule 8, it is apparent that it contemplates shifting the entire factory of the assessee. Rule 8(1) will not apply if only a part of the manufacturing activity is shifted to another site. In the present case, out of three units at Dadar which were used for manufacture of final product of grey and processed fabric, only one unit has been shifted and not entire factory. We have carefully perused the application dated 18th May 2002 as well as subsequent application dated 17th January 2004. In the first application, it is not the case made out that yarn which is manufactured at the new site is a final product which is sold separately. Though letter dated 17th January 2004 states that yarn and fabrics are both final products, it is not the case made out by the appellant that yarn manufactured at Dhamni is being sold or exported to third parties. On the contrary, in the letter dated 8th May 2002, a specific statement made by the appellant is that yarn manufactured at Dhamni unit will be transferred to Dadar unit for manufacturing of grey and processed fabric. Thereafter, the processed fabric will be sold. Specific stand in the letter dated 18th May 2002 is that yarn manufactured at Dhamni will be transferred to Dadar unit for manufacturing grey and processed fabric.

16 We have perused the impugned Judgment and order. The Appellate Tribunal has referred to the

definition of factory in clause a of section 2 of the said Act and the Sub Rule 1 of Rule 8 of the CENVAT Rules. For the reasons which we have recorded earlier, we agree that the final conclusion that Sub-Rule 1 of Rule 8 of the CENVAT Rules will not apply to the facts of the case.

17 Our attention was also invited to Sub-Rule 6 of Rule 57F which talks of shifting of the plant or factory to another site. Neither Sub-Rule 6 of Rule 57F of the said Rules nor Sub-Rule 1 of Rule 8 of CENVAT rules are applicable. An activity which is only a part of the manufacturing activity of final product has been transferred another side.

18 Therefore, we see no merit in the appeal and the same is accordingly dismissed with no order as to costs.

(A.K.MENON,J.) (A.S.OKA,J.)