

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.12.2016

PRONOUNCED ON : 15.02.2017

CORAM

THE HONOURABLE MR.JUSTICE HULUVADI G. RAMESH

AND

THE HONOURABLE DR.JUSTICE ANITA SUMANTH

C.M.A.No.833 of 2010

M/s.Australian Foods (P) Ltd.,
Spencers Plaza,
F-IIIA 1st Floor, II Phase,
Anna Salai, Chennai 600 002. ... Appellant/Appellant

Vs

Commissioner of central Excise,
Chennai II Commissionerate,
Chennai 600 035. ... Respondent/Respondent

Prayer: Civil Miscellaneous Appeal filed under section 35G of
the Central Excise Act, 1944 against the order No.1685/09 of
the Customs, Excise and Service Tax Appellate Tribunal,
Chennai dated 11.11.2009.

For Appellant in all appeals : Mr.Arun Kurian Joseph

For Respondent in all appeals : Mr.S.Rajasekar

J U D G M E N T

(Order of the Court was delivered by Dr.Anita Sumanth, J.)

The appellant in the appeal assails the order of the
Customs, Excise and the Service Tax Appellate Tribunal
(CESTAT) dated 11.11.2009.

2. The admitted substantial questions of law that arise
for consideration in the appeal are as follows;

1. Whether in the facts and circumstances of
the case, the Tribunal was right in law in applying
the provisions of Rule 9(b) of the CENVAT Credit
Rules, 2004 to a case of inter unit transfer of semi
finished goods, where there is no question of
clandestine removal to any third party by way of
sale?

2. Whether in view of the notification issued
under section 11C regarding clearance of 'dough',
CENVAT credit can be denied on the ground that the

'dough' was cleared clandestinely without payment of duty from one unit to another of the same company?

3. The appellant is a manufacturer of dough falling under chapter 19092000 and Cookies falling under CSH 19053100 of the Central Excise Tariff Act 1985.

4. For the period 1.3.2005 to 24.1.2006, a show cause notice was issued by the Central Excise authorities on the basis that there had been clandestine removals of dough from the appellants' unit at Ambattur to its unit at Spencer Plaza that were liable to duty and alleging suppression. The Appellant responded stating that it had been under the bonafide impression that there was no liability of Dough to duty. It submitted that it was only upon inspection and adverse action being taken by the authorities in January 2006 that the Appellant came to realize the stand of the Department, immediately, upon which, duty was voluntarily remitted in the same month. Upon remittance, the unit at Ambattur raised supplementary invoices to enable the unit at Spencer Plaza to avail CENVAT Credit of the duty paid. The department was of the view that the availment of CENVAT credit was in contravention of the provisions of Rule 9(b) of the CENVAT credit Rules 2004 for the reason that the duty paid had become recoverable by reason of fraud, collusion/willful misstatement and suppression of facts and contravention of the provisions of the Excise Act or rules with intent to evade payment of duty. The assessee was thus asked to show cause as to why the amount of CENVAT duty not be recovered along with interest and penalty.

5. Notwithstanding the objections tendered, an order-in-original dated 15.3.2007 was passed that confirmed the proposals in the Show Cause Notice. The order was confirmed in first appeal as regards the availment of credit and consequent demand, and reducing the penalty imposed. In second appeal, the CESTAT confirmed the order of the Commissioner (Appeals) against which, the present appeal is filed.

6. Heard the learned counsel appearing for the parties. It would appear that the appellant had approached the Settlement Commission for settlement of proceedings initiated against it after the investigation in January 2006. Reference has been made by the Revenue to the order of the settlement commission in the case of this appellant dated 6.12.2006. He would rely upon the factual finding confirming suppression, in paragraph 7 extracted below;-

'7. The next submission of the applicant is regarding immunity from interest and penalty on the ground that they have effected payment before issue of the Show Cause Notice. They have also cited various decisions of the Tribunal and the High Court to submit that there was no intention to evade duty as they have made payment in

advance. While we are agreeable that in view of the true and correct disclosure by the applicants they are eligible for immunity from penalty, we find that the Show Cause Notice has alleged that the applicant company has evaded duty without properly declaring the nature of the goods to the Department. In view of the clandestine nature of clearances, we are not convinced about their argument that the applicants had no intention to evade duty. Accordingly, we are not inclined to extend complete immunity from interest.'

7. The order of the settlement commission was accepted by the assessee/appellant, but challenged by way of writ petition by the Central Excise Department before this court, which, by order dated 23.9.2008 (Commissioner of Central Excise, Chennai, Vs. Australian Foods Limited (242 ELT 504)) allowed the same setting aside the order of the settlement commission dated 6.12.2006. A Writ Appeal against the aforesaid order by the assessee was dismissed by a Division Bench of this Court in a decision reported in 254 ELT 392, thus confirming the order of the learned Single Judge setting aside the order of the Settlement Commission. The order of the CESTAT dated 11.11.2009 relies on the factual finding of the settlement commission relating to suppression. We are of the opinion that as a result of the setting aside of the order of the Settlement Commission by the Single Judge and the confirmation thereof by the Division Bench, the order of the settlement commission and the findings rendered therein, stand obviated. Reliance by the CESTAT on such findings therein are consequently misplaced.

8. An order of the Bangalore Bench of the CESTAT, in the case of SSR Foods and Beverages Private Limited vs Commissioner of Central Excise, Hyderabad (2010) 259 ELT 750 on identical facts was brought to our attention. The appellant in that case was also engaged in the manufacture of cookies and had availed CENVAT credit on dough purchased from Australian Foods India Private Limited, the appellant before us. The matter travelled to the CESTAT on an identical factual and legal matrix and the CESTAT, Bangalore bench, took the view that the allegation of suppression could not be sustained since the order of the Settlement Commission, based on the finding of which, such allegation was made, itself did not exist. This view appeals to us. It is relevant to note that the order of the Settlement Commission is dated 6.12.2006 and the Notice to show cause was issued on 17.1.2007. The orders in original and first appeal (passed exparte) making reference to and relying upon the order of the Settlement Commission, are dated 15.3.2007 and 30.4.2008. The order of the Settlement Commission has been set aside by the Single Judge on 23.9.2008 and confirmed in Writ Appeal on 5.3.2010. The order of the Single Judge was thus available when the order of the CESTAT was passed and ought to have been taken into consideration.

This was however not done and the CESTAT confirms the allegation of suppression based solely on the order of the Settlement Commission that has been set aside.

9. It is also relevant to note that both the Single Judge as well as the Division Bench have confirmed the position that a claim under Section 4A of the Central Excise Act would not come within the purview of jurisdiction of the settlement commission and as such the assumption of jurisdiction of the Settlement Commission was itself incorrect. Thus, the order of the Settlement Commission and the findings therein are not be a factor to contend with.

10. On the aspect of eligibility to exemption from Duty, notification 20/2009-CE (N.T.) dated 18.8.2009 issued by the Board in terms of section 11C indicates that there was an intention to exempt 'dough' from the payment of duty. The notification refers to the period 28.2.2005 to 27.5.2008 which includes the period under dispute, being March 2005 to December 2006. The notification is extracted in entirety below:-

'Dough for preparation of Baker's wares - Exemption during period 28.2.2005 to 27.5.2008

Whereas the Central Government is satisfied that a practice was generally prevalent regarding levy of duty of excise (including non-levy thereof) under section 3 of the Central Excise Act, 1944 (1 of 1944) (hereinafter referred to as the said Act), on goods of the description given in table below, and that such goods were liable to duty of excise which was not being levied under section 3 of the said Act according to the said practice, during the period as specified in the said Table, namely:-

TABLE

Description	Tariff sub-heading	Period
(1)	(2)	(3)
Dough for preparation of Baker's wares of Heading No.1905	1901-2000	28 th February, 2005 to 27 th May, 2008

'2. Now, therefore, in exercise of the powers conferred by section 11C of the said Act, the Central Government hereby directs that the whole of duty of excise leviable under the said Act on such goods falling under such tariff sub-heading as specified in the said Table but for the said practice, shall not be required to be paid for the period specified in column (3) of the said Table, subject to fulfillment of condition that the benefit under this notification shall not be admissible unless the unit claiming benefit in terms of this notification reverse the input credit, if any, taken in

respect of inputs used in manufacture of such goods on which the said duty of excise was not levied during the aforesaid period in accordance with the said practice.'

In the present case the Appellant has remitted the duty and is thus entitled to the credit claimed. The embargo in terms of Rule 9(b) of the CENVAT Credit Rules 2004 is not attracted in the facts and circumstances as noted above.

11. The questions of law are answered in favour of the assessee and the appeal allowed. No costs.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

msr

To

- 1.The Commissioner of Central Excise,
Chennai II, Commissionerate,
Chennai 35.
- 2.The Customs, Excise and Service Tax,
Appellate Tribunal,
South Zonal Bench, Chennai.

+lcc to Mr.Arun Kurian Joseph, Advocate, S.R.No.10181
+lcc to Mr.S.Rajasekar, Advocate, S.R.No.9822

C.M.A.No.833 of 2010

VGI (CO)
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