SUPREME COURT OF INDIA

Commissioner of Central Excise, Nagpur

Vs.

Ballarpur Industries Ltd

C.A.No.1373 of 2002

(S. H. Kapadia and B. Sudershan Reddy JJ.)

30.08.2007

JUDGMENT:

KAPADIA, J.

1. This civil appeal is filed by the Department under Section 35L(b) of the Central Excise Act, 1944 against the judgment dated 20.7.2001 delivered by the Customs, Excise and Gold (Control) Appellate Tribunal ("CEGAT") in Appeal No. E/1758/2000.

2. The issue which arises in this civil appeal is as to whether in the absence of any "sale", rule 57CC of the Central Excise Rules, 1944 would have any application or not. The contention of the assessee is that in the case of "stock transfer" there is no "sale" and, therefore, rule 57CC was not applicable. This contention has been accepted by the Tribunal, hence this civil appeal.

3. The assessee is engaged in manufacture of paper falling under Chapter 48 of the Central Excise Tariff. The assessee is availing the benefit of MODVAT Scheme under Rule 57A of the Central Excise Rules, 1944 (for short, "1944 Rules"). The assessee is also manufacturing pulp falling under Chapter 47 of the Central Excise Tariff, which is chargeable to nil rate of duty. The said pulp is captively consumed for the manufacture of paper. According to the assessee, a small portion of the pulp is sent to the sister unit of the assessee at Asthi. According to the assessee, there was no sale of pulp as alleged by the Department. According to the assessee, a small quantity of pulp manufactured by the assessee was stock transferred to its sister unit at Asthi.

4. In this civil appeal, we are concerned with the period September, 1996 to March, 1999. During this period, the assessee had transferred approximately 41000 MT of pulp to its sister unit and had paid duty at the rate of eight per cent of the cost price declared by them.

5. Three show cause notices were issued by the Department dated 21.5.1999, 30.9.1999 and 18.11.1999 in which it was alleged that if comparable prices obtained by the sister units are taken into consideration then the total duty payable at the rate of eight per cent would work out to Rs. 4.58 lacs (approx.) whereas the assessee had paid duty of Rs. 2.67 lacs (approx.). Therefore, it was alleged that the assessee had evaded payment of duty to the tune of Rs. 1.90 lacs (approx.) and accordingly they were also liable to pay penalty under Rule 57-I(4) read with Rule 173C of the 1944

Rules.

6. Vide reply dated 25.6.1999, the assessee contended that there was no sale of pulp, that it was the case of stock transfer of pulp which was consumed as raw-material in the manufacture of paper by the sister unit of the assessee. According to the assessee, a major portion of the pulp manufactured by it was consumed by the assessee and a very small percentage was stock transferred to the sister unit, which consumed the transferred pulp in the manufacture of paper. According to the assessee, in their reply to show cause notices, price declarations were filed for clearance of pulp to their sister unit at Asthi by way of stock transfer and, therefore, they adopted the rate of 8 per cent of the cost price for purposes of reversal of credit on inputs on which credit was taken. In this connection, the assessee applied rule 6(b)(ii) of the Central Excise (Valuation) Rules, 1975 (for short, "Valuation Rules 1975"). According to the Department, the assessee should have taken into account 8 per cent of the selling price of pulp sold by the assessee's sister units in other states for reversal of MODVAT credit on inputs on which credit was taken by applying rule 6(b)(i) of the Valuation Rules 1975. If rule 6(b)(i) was to apply then considering the sale price of pulp cleared in other states, the duty amount payable by the assessee herein, worked out to Rs.4,57,56,812/- whereas assessee had paid an amount of Rs.2,67,32,851.

7. At this stage, it may be clarified that, in this case, three show cause notices were issued; the first was dated 21.5.1999, which related to the period September, 1996 to March, 1999, second show cause notice was dated 30.9.1999, which related to the period April, 1999 to June, 1999, and the third show cause notice was dated 18.11.1999, which related to the period July, 1999 to September, 1999. This difference is required to be kept in mind because under the first show cause notice dated 21.5.1999, the Department has invoked the extended period of limitation, whereas the second and the third show cause notices dated 30.9.1999 and 18.11.1999 were for the periods April, 1999 to June, 1999 and July, 1999 to September, 1999 respectively, which were within limitation.

8. Value is the function of price. In every case in which there is an allegation of evasion, a show cause notice constitutes the foundation on which the demand made by the Department could stand or fall. Rule 57CC deals with adjustment of credit on inputs used in the manufacture of exempted final products. It applies in cases where a manufacturer is engaged in the manufacture of any final product which is chargeable to duty as well as any other final product which is exempted from payment of duty or chargeable to nil rate of duty and the manufacturer takes credit of the specified duty on any inputs, which is used in manufacture of both the above categories of final products. In such a case, the manufacturer is required to pay a presumptive amount equal to eight per cent of the price of the exempted final product charged by the manufacturer for the sale of such goods at the time of their clearance from the factory.

9. For the purpose of deciding this matter, we quote hereinbelow sub- rules (1), (7), (8) and (9) of rule 57CC of the Central Excise Rules, 1944: "Rule 57CC. Adjustment of credit on inputs used in exempted final products or maintenance of separate inventory and accounts of inputs by the manufacturer.- (1) 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 there on or is chargeable to nil rate of duty and the manufacturer takes credit of the specified duty on any inputs (other than inputs used as fuel) which is used or ordinarily used in or in relation to the manufacture of both the aforesaid categories of final products, whether directly or indirectly and whether contained in the said final products or not, the manufacturer shall, unless the provisions of sub-rule (9) are complied with, pay an amount equal to eight per cent of the

price (excluding sales tax and other taxes, if any, payable on such goods) of the second category of final products charged by the manufacturer for the sale of such goods at the time of their clearance from the factory.

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(7) The provisions of sub-rule (1) shall apply even if the inputs on which credit has been taken are not actually used or contained in any particular clearance of final products.

(8) If any goods are not sold by the manufacturer at the factory gate but are sold from a depot or from the premises of a consignment agent or from any other premises, the price (excluding sales tax and other taxes, if any, payable) at which such goods are ordinarily sold by the manufacturer from such depot or from the premises of a consignment agent or from any other premises shall be deemed to be the price for the purpose of sub-rule (1).

(9) In respect of inputs (other than inputs used as fuel) which are used in or in relation to the manufacture of any goods, which are exempt from the whole of the duty of excise leviable thereon or chargeable to nil rate of duty, the manufacturer shall maintain separate inventory and accounts of the receipt and use of inputs for the aforesaid purpose and shall not take credit of the specified duty paid on such inputs." (emphasis supplied)

10. For the sake of convenience, we also quote hereinbelow Section 4(1) and (2) of the Central Excise Act, 1944 (for short, "1944 Act") as it stood at the relevant time:

"Section 4. Valuation of excisable goods for purposes of charging of duty of excise. - (1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to value, such value, shall, subject to the other provisions of this section, be deemed to be

(a) the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal where the buyer is not a related person and the price is the sole consideration for the sale :

Provided that

(i) where, in accordance with the normal practice of the wholesale trade in such goods, such goods are sold by the assessee at different prices to different classes of buyers (not being related persons) each such price shall, subject to the existence of the other circumstances specified in clause (a), be deemed to be the normal price of such goods in relation to each such class of buyers;

(1a) Where the price at which such goods are ordinarily sold by the assessee is different for different places of removal, each such price shall, subject to the existence of other circumstances specified in clause (a), be deemed to be the normal price of such goods in relation to each such place of removal.

(ii) where such goods are sold by the assessee in the course of wholesale trade for delivery at the time and place of removal at a price fixed under any law for the time being in force or at a price, being the maximum, fixed under any such law, then, notwithstanding anything contained in clause (iii) of this proviso, the price or the maximum price, as the case may be, so fixed, shall, in relation

to the goods so sold, be deemed to be the normal price thereof;

(iii) where the assessee so arranges that the goods are generally not sold by him in the course of wholesale trade except to or through a related person, the normal price of the goods sold by the assessee to or through such related person shall be deemed to be the price at which they are ordinarily sold by the related person in the course of wholesale trade at the time of removal, to dealers (not being related persons) or where such goods are not sold to such dealers, to dealers (being related persons), who sell such goods in retail;

(b) where the normal price of such goods is not ascertainable for the reason, that such goods are not sold or for any other reason, the nearest ascertainable equivalent thereof determined in such manner as may be prescribed.

(2) Where, in relation to any excisable goods the price thereof for delivery at the place of removal is not known and the value thereof is determined with reference to the price for delivery at a place other than the place of removal, the cost of transportation from the place of removal to the place of delivery shall be excluded from such price."

11. We also quote hereinbelow Instructions issued by the Central Board of Excise and Customs based on Circular No. B-42/1/96-TRU; dated 27.9.1996 (1996 (88) ELT T5):

"Modvat Reversal of credit for inputs used in the manufacture of exempted product Kind attention is invited to the provisions of Rule 57CC of the Central Excise Rules for reversal of Modvat credit in respect of inputs used in the manufacture of exempted goods or goods chargeable to 'nil' rate of excise duty. The provision has been made that where a manufacture uses inputs which are common to both dutiable goods as well as exempted goods, the manufacturer is required to debit the amount equal to 8% of the value of the exempted goods when they are cleared from the factory.

2. In some cases, the exempted goods cleared by one manufacturer are used as inputs by another manufacturer. The manufacture of exempted goods indicates the amount of Modvat credit reversed on the invoices issued by him for such exempted goods. In this context, some doubts have been raised whether the amount of Modvat credit so reversed is available as Modvat credit to the user of such exempted goods when he uses them as inputs in his factory.

3. In this context, it is clarified that the amount reversed is not by way of payment of excise duty. Accordingly, the amount of Modvat credit reversed and shown in the invoice by the manufacturer of exempted goods cannot be taken as credit by the user of exempted goods." (emphasis supplied)

12. Rule 57CC was placed on statute book by Notification No. 14/96-CE dated 23.7.1996. It was issued under Section 37 of the 1944 Act. Sub-rule (1) refers to a manufacturer who manufactures excisable goods which are chargeable to duty as well as goods which are exempt or which are chargeable to nil rate of duty. If the said manufacturer takes credit on inputs, as in the present case, which he ordinarily uses in the manufacture of both exempt as well as dutiable final products, he was required to comply with the conditions mentioned in sub-rule (9). Otherwise, upon removal of final product, which was exempt from payment of duty, he was required to pay a presumptive amount equal to 8 per cent of the price charged by him on the exempted final products at the time of clearance. Sub-rule (2) provided that presumptive amount of 8 per cent was payable either by debit in RG 23A Part II register or by debit in PLA. Sub-rule (8) provided that if the exempted goods

were not sold at the factory gate, the price at which such goods were sold at the manufacturer's depot or from the premises of the consignment agent or any other premises, shall be deemed to be the price for the purpose of sub-rule (1). Therefore, sub-rule (8) was also based on the concept of "deemed price". Sub-rule (9) provided that in respect of common inputs, the manufacturer shall maintain separate inventory and accounts of the use of inputs used in the manufacture of exempted products and shall not take credit of duty on such specified inputs. As stated above, if the manufacturer opts not to maintain separate accounts under sub-rule (9) then upon removal of final product which is exempt from payment of duty, he would be required to pay a notional sum equal to 8 per cent of the price charged by him on the exempted final products at the time of clearance. Lastly, sub-rule (7) provided that sub-rule (1) would be attracted even if inputs on which credit has been taken, are not actually used. However, the said sub-rule (7) must be read with the phrase "which goods are ordinarily used in the manufacture of exempted final products and dutiable final products" mentioned in sub-rule (1). If read together, it becomes evident that in order to apply sub-rule (7), the Department had to establish that common inputs were ordinarily used for both the categories of final products.

13. The object of the rule 57CC(1) was to recover a presumptive sum upon removal of exempted goods from a manufacturer who also manufactured dutiable goods, but using common input for both dutiable as well as duty exempted goods and who took MODVAT credit on such common inputs. Rule 57CC sought, therefore, to recover a presumptive sum equal to eight per cent of the price of exempted goods at the time of their removal where the manufacturer did not undertake maintenance of inventory/accounts of the clearance of exempted final products. Even sub- rule (7) of rule 57CC was based on "deemed price" if read with rule 57CC(1). Sub-rule (7) read with sub-rule (1) prevented an assessee from contending that he was not liable to pay the presumptive sum of eight per cent of the price of exempted goods on the ground that the said exempted goods were wholly manufactured out of inputs on which no credit of duty had been taken under rule 57A. The amount required to be paid at the time of removal of exempted goods under rule 57CC(1) had to be done in the same manner as was the case with any other excisable goods as the rate of duty stood determined at the rate of eight per cent in the rule itself. The said presumptive amount was required to be paid by debiting in PLA register or by payment in cash. As stated above, there was an alternative provided under sub-rule (9) which relieved the manufacturer of the liability to pay eight per cent of the price of exempted goods at the time of removal of such goods. Under sub-rule (9), the assessee was required to maintain a separate account and an inventory and that he was not entitled to take credit on the inputs meant for use in exempted final product. If such accounts and inventory were maintained, there was no need to pay a presumptive amount equal to eight per cent of the price of exempted goods at the time of their removal.

14. In our view, rule 57CC, therefore, required payment of a presumptive amount of eight per cent of the price of the exempted goods, net of sales tax and other taxes. This rule was self contained provision indicating the basis on which price had to be determined. The rule, however, has not called the said amount of eight per cent as duty of excise. As indicated in the above circular, quoted above, the manufacturer who did not maintain account or inventory was required to debit the amount equal to 8 per cent of the value of exempted goods at the time of removal of goods from the factory. In our view, the said amount of 8 per cent of the value of the goods at the time of clearance is the measure and it brings in also the applicability of section 4 of the 1944 Act and the Valuation Rules 1975 framed thereunder.

15. Under Section 4(1)(a) normal price was the basis of the assessable value. It was the price at

which goods were ordinarily sold by the assessee to the buyer in the course of wholesale trade. Under Section 4(1)(b) it was provided that if the price was not ascertainable for the reason that such goods were not sold or for any other reason, the nearest equivalent thereof had to be determined in terms of the Valuation Rules, 1975. Therefore, rule 57CC has to be read in the context of Section 4(1) of the 1944 Act, as it stood at the relevant time. Section 4(1)(a) equated "value" to the "normal price" which in turn referred to goods being ordinarily sold in the course of wholesale trade. In other words, normal price, which in turn referred to goods being ordinarily sold in the course of wholesale trade at the time of removal, constituted the basis of the assessable value. Rule 57CC(1) proceeds on the basis that the manufacturer has taken credit of the specified duty on "common inputs" which needs to be reversed at eight per cent (i.e. the manufacturer needs to debit an amount equal to eight per cent of the price of the exempted final product charged for the sale of such goods. This amount is a presumptive sum calculated at eight per cent of the price charged. The rate of eight per cent is the measure to calculate the presumptive sum. Further, reading rule 57CC(1) with rule 57CC(8) one finds that entire rule is based on "deemed price" and "recovery of presumptive amount" and, therefore, in our view, the words "price charged at the time of sale" must be read as "eight per cent of the value of the exempted goods". Our interpretation stands supported by the Instructions issued by the Central Board of Excise and Customs based on the circular No. B-42/1/96-TRU dated 27.9.1996. This is where section 4 and the Valuation Rules, 1975 come into play. In the light of the above discussion, the adjudicating authority was required to adjudicate upon applicability of rule 6(b)(i) and rule 6(b)(ii). However, it has been held by the adjudicating authority that rule 6(b)(i) is not applicable, hence, in our view the only issue which remains to be decided is whether all the requisite elements of costing like wages, profits etc. have been taken into account by the assessee herein as required under rule 6(b)(ii).

16. In the case of Union of India and ors. v. Bombay Tyre International Ltd. AIR 1984 SC 420 this Court had drawn a distinction between the nature of levy and the measure/yardstick on which the tax (duty) is determined.

17. In the circumstances, rule 57CC is a provision which seeks to recover presumptive amount at the rate of eight per cent of the price of exempted final product at the time of removal for sale. In the circumstances, the Tribunal erred in holding that Rule 57CC is not applicable to the present case as it involves stock transfer and not a sale. If the view of the Tribunal is to be accepted, then neither Section 4 of the 1944 Act nor the Valuation Rules, 1975 framed thereunder could apply. If the nature of the presumptive sum is kept in mind then there will be no conflict between our view and the view expressed by the Central Board of Excise and Customs vide Instructions based on circular No. B-42/1/96-TRU; dated 27.9.1996. We have enunciated the above principles concerning rule 57CC on account of the total confusion both in the industry as well as in the Department.

18. In the case of M/s Continental Foundation Joint Venture Sholding v. CCE, Chandigarh-I (Civil Appeal No. 3139/2002 etc.) a show cause notice under Section 11A of the 1944 Act was issued to the assessee invoking extended period of limitation on the grounds of suppression, fraud and collusion. The Division Bench of this Court, to which one of us, Kapadia, J., was the member, held that where various circulars, instructions/directions stood issued at different points of time and where there was no clarity in the views expressed by the authorities, extended period of limitation cannot be invoked. It was held that the word "suppression" in Section 11A of the 1944 Act is accompanied by the words "fraud" or "collusion" and, therefore, the word "suppression" should be construed strictly. That, mere omission to give correct information did not constitute suppression unless that omission was made willfully in order to evade duty. That, suppression would mean

failure to disclose full and true information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party would not constitute suppression. That, an incorrect statement cannot be equated with a willful mis-statement. The latter implies making of an incorrect statement with the knowledge that the statement made was not correct.

19. Applying the above tests to the facts of the present case, we hold that the Department was not entitled to invoke the extended period of limitation vide the first show cause notice dated 21.5.99. However, the second and third show cause notices dated 30.9.1999 for the period April, 1999 to June, 1999 and 18.11.1999 for the period July, 1999 to September, 1999 respectively are within time. Therefore, we strike down only the first show cause notice dated 21.5.1999. However, we hereby set aside the impugned judgment of the Tribunal which has held that rule 57CC of the 1944 Rules is not applicable to this case as there was no "sale". In cases where the manufacturer does not comply with rule 57CC(9), he shall debit the presumptive sum equal to eight per cent of the value of the exempted goods at the time of clearance from the factory gate. This rule would apply to stock transfers also.

20. In the light of our aforestated interpretation of rule 57CC of the 1944 Rules, we set aside the impugned judgment of the CEGAT and remit the aforesaid second and third show cause notices to the Commissioner of Central Excise, who will decide the question of applicability of rule 6(b)(i) and rule 6(b)(ii) of the Valuation Rules 1975 in accordance with law.

21. Before concluding, we may mention that, in the present case, the second and the third show cause notices are alone remitted. The first show cause notice dated 21.5.1999 is set aside as time barred. However, it is made clear that Rule 7 of the Valuation Rules 1975 will not be invoked and applied to the facts of this case as it has not been mentioned in the second and the third show cause notices. It is well settled that the show cause notice is the foundation in the matter of levy and recovery of duty, penalty and interest. If there is no invocation of Rule 7 of the Valuation Rules 1975 in the show cause notice, it would not be open to the Commissioner to invoke the said rule.

22. Accordingly, the civil appeal filed by the Department is partly allowed and the second and the third show cause notices dated 30.9.1999 and 18.11.1999 respectively are remitted to the Commissioner for determination in accordance with the principles laid down hereinabove. The civil appeal filed by the Department stands partly allowed with no order as to costs.