SUPREME COURT OF INDIA

Commissioner of Central Excise, Vadodara

Vs.

Gujarat Narmada Valley Fertilizers Company Ltd.

C.A.Nos.4189-4196 of 2010

(Swatanter Kumar and Madan B.Lokur JJ.)

11.12.2012

JUDGMENT

Madan B. Lokur, J.

1. The assessee utilizes cenvat duty paid Low Sulphur Heavy Stock (for short LSHS) as fuel input for generating steam. The steam so generated is utilized to generate electricity for the manufacture of fertilizer which is exempt from excise duty. According to the assessee, it is entitled to claim cenvat credit on the input, that is, LSHS even though fertilizer is exempt from excise duty. The correctness of this view was disputed by the Revenue.

2. Consequently, the Commissioner, Central Excise Customs, Vadodara-II (hereinafter referred to as 'the Commissioner') issued two notices to the assessee to show cause why cenvat credit wrongly availed by it should not be recovered under Rule 12 of the Cenvat Credit Rules, 2002 (hereinafter referred to as Rules) read with Section 11A of the Central Excise Act, 1944. The assessee was also required to show cause why interest be not recovered on the wrongly availed cenvat credit and why penalty be not imposed on it.

3. The first show cause notice issued to the assessee was dated 8th March 2004 and pertained to the period 31st March 2003 to September 2003 while the second show cause notice was dated 28th July 2004 and was for the period October 2003 to March 2004.

4. The assessee replied to both the show cause notices and after giving the assessee an opportunity of hearing, the Commissioner adjudicated the first show cause notice by passing an order adverse to the assessee on 24th June 2004. The second show cause notice was similarly adjudicated and an adverse order passed on 30th August 2004. By these orders, the Commissioner confirmed the demand of cenvat credit wrongly claimed by the assessee. The Commissioner also directed the assessee to pay interest on the demanded amount and also

imposed personal penalty under Rule 13 of the Rules. Proceedings before the Tribunal:

5. Feeling aggrieved, the assessee preferred two appeals before the Customs, Excise Service Tax Appellate Tribunal at Mumbai (hereinafter referred to as the Tribunal). The appeals were numbered as Appeal Nos.E/2517/2004 and E/3672/2004.

6. For reasons that are not apparent from the record, both appeals were referred to a larger Bench and heard by the Vice-President and two members of the Tribunal (hereinafter referred to for convenience as the larger Bench). By an order dated 27th December 2006/4th January 2007, the larger Bench held that the assessee was entitled to claim cenvat credit on the LSHS used as input for producing steam and electricity for the manufacture of fertilizer. According to the larger Bench, the issue raised by the assessee was fully covered in its favour by a decision of the Tribunal inGujarat Narmada Fertilizers Co. Ltd. v. Commissioner of Central Excise, Vadodara, 2004 (176) ELT 200 (Tri. - Mumbai) against which the Revenue's appeal before the Gujarat High Court was dismissed since no substantial question of law arose. The decision of the Gujarat High Court isCommissioner of Central Excise and Customs v. Gujarat Narmada Fertilizers Co. Ltd., 2006 (193) ELT 136 (Gujarat).

7. The Tribunal was, therefore, of the opinion that the issue was no longer res integra and the decision earlier rendered by the Tribunal was binding upon the parties. The reference made to the larger Bench was then answered in the following terms:-
"The reference is thus answered by holding that the assessees are eligible to cenvat credit of duty paid on that quantity of LSHS which was used for producing steam and electricity used in turn in relation to manufacture of exempted goods, namely fertilizers."

8. Pursuant to the decision of the larger Bench, the substantive appeals were placed before a Division Bench of the Tribunal. By an order dated 10th April 2008 (impugned before us) the Division Bench of the Tribunal allowed the assessee's appeals relying on the decision of the larger Bench. Earlier proceedings in this Court:

9. In the meanwhile, the Revenue preferred an appeal to this Court against the decision of the larger Bench of the Tribunal. By a judgment and order dated 17th August 2009 (rendered after the impugned order passed by the Tribunal), this Court in Commissioner of Central Excise v. Gujarat Narmada Fertilizers Company Limited, (2009) 9 SCC 101 set aside the order of the larger Bench and decided the issue raised in favour of the Revenue.

10. This Court held that the Tribunal (and later the Gujarat High Court) did not correctly appreciate the legal position in Gujarat Narmada. In coming to this conclusion, this Court referred to Rule 6 of the Rules. For convenience, Rule 6(1) and 6(2) of the Rules are reproduced and they read as follows:-

"6. Obligation of manufacturer of dutiable and excisable goods-
(1) The CENVAT credit shall not be allowed on such quantity of inputs which is used in the manufacture of exempted goods, except in the circumstances mentioned in sub-rule (2).
Provided xxx xxx xxx

(2) Where a manufacturer avails of CENVAT credit in respect of any inputs, except inputs intended to be used as fuel, and manufactures such final products which are chargeable to duty as well as exempted goods, then, the manufacturer shall maintain separate accounts for receipt, consumption and inventory of inputs meant for use in the manufacture of dutiable final products and the quantity of inputs meant for use in the manufacture of exempted goods and take CENVAT credit only on that quantity of inputs which is intended for use in the manufacture of dutiable goods."

11. This Court was of the view that Rule 6(1) of the Rules is plenary and that cenvat credit for duty paid inputs used in the manufacture of exempted final products is not allowable. Rule 6(1) of the Rules covers all inputs, including fuel. Law Information Center 3 On the other hand, Rule 6(2) of the Rules refers to other inputs (other than fuel) used in or in relation to the manufacture of the final product (dutiable and exempted).

12. This Court further held that on a cumulative reading of Rule 6(1) and Rule 6(2) of the Rules it is clear that the legal effect of Rule 6(1) of the Rules is applicable to all inputs, including fuel. Therefore, cenvat credit will not be permissible on the quantity of fuel used in the manufacture of exempted goods. As regards non-fuel inputs, an assessee would have to maintain separate accounts or be governed by Rule 6(3) of the Rules.

13. As mentioned above, when the substantive appeals were taken up for consideration by the

Division Bench of the Tribunal, the decision of this Court in Gujarat Narmada was not available. Accordingly, by the impugned order, the Division Bench of the Tribunal allowed the appeals filed by the assessee relying on the decision of the larger Bench of the Tribunal. It is under these circumstances that the Revenue is before us. Submissions:

14. The first and in fact the only contention of the learned Additional Solicitor General appearing for the Revenue was that these appeals deserve to be allowed in view of the decision rendered by this Court in Gujarat Narmada. It was submitted that the orders impugned in these appeals were dependent upon the order passed by the larger Bench of the Tribunal on 27th December 2006/4th January 2007. The decision of the larger Bench having been set aside by this Court in Gujarat Narmada the substratum of the case of the assessee is wiped out.

15. On the other hand, the submission of learned counsel for the assessee was that the issue whether LSHS is an "input" as defined in Rule 2(g) of the Rules is debatable. According to the assessee, it should be given a wide meaning, but in Maruti Suzuki Ltd. v. Commissioner of Central Excise, Delhi-III (2009) 9 SCC 193 this Court gave "input" a restrictive meaning. The correctness of this view was doubted in Ramala Sahkari Chini Mills Limited, Uttar Pradesh v. Commissioner, Central Excise, Meerut-I, (2010) 14 SCC 744 and the issue has been referred to a larger Bench of this Court. It was submitted that if it is held in these appeals that LSHS is not an input, then the assessee would be adversely affected. It was, therefore, submitted that these appeals may also be referred to a larger Bench or we may await the decision of the larger Bench of this Court.

16.On merits, it was submitted that while deciding Gujarat Narmada this Court did not notice its earlier decision in Commissioner of Central Excise Vadodara v. Gujarat State Fertilizers Chemicals Ltd., (2008) 15 SCC 46. In GSFCL it was clearly held in favour of the assessee that a claim of modvat credit on LSHS is justified if it is used in the manufacture of steam, which in turn is used in the generation of electricity for the manufacture of fertilizer exempt from duty. Since that decision was overlooked, this Court fell into error while deciding Gujarat Narmada against the assessee.

17. Assuming "input" is not given a restrictive meaning, then in view of GSFCL the issue whether the assessee is entitled to claim cenvat credit on duty paid LSHS is no longer open to discussion and the appeals must be dismissed on that basis alone.

18. In response, the learned Additional Solicitor General submitted that the interpretation of "input" does not arise in these appeals and we may proceed on the basis that "input" as defined in Rule 2(g) of the Rules may be given a broad interpretation and that LSHS utilized by the assessee is an input for the manufacture of fertilizer exempted from duty. The second step, namely, entitlement to cenvat credit does not necessarily follow even if the first step is decided in favour of the assessee. There was, therefore, no necessity of referring these appeals to a larger Bench of this Court and the case was fully covered in favour of the Revenue in

view of Gujarat Narmada.
Our view:
19. There is an apparent conflict between GSFCL and Gujarat Narmada.

20. In GSFCL a view has been taken that modvat credit can be taken on LSHS used in the manufacture of fertilizer exempt from duty. Although this decision was rendered in the context of availing modvat credit under the Central Excise Rules, 1944 as they existed prior to the promulgation of the Cenvat Credit Rules, 2002 the principle of law laid down is general and not specific to the Central Excise Rules, 1944. The decision rendered in Gujarat Narmada has been rendered in the context of the Cenvat Credit Rules, 2002 and is, therefore, more apposite. However, since GSFCL does lay down a general principle of law, we have no option but to refer the issue to a larger Bench to resolve the conflict between GSFCL and Gujarat Narmada. The conflict to be resolved is whether under the Cenvat Credit Rules, 2002 an assessee is entitled to claim cenvat credit on duty paid LSHS utilized as an input in the manufacture of fertilizer exempt from duty.

21. The Registry may place the case papers before Hon'ble the Chief Justice for constituting a larger Bench to decide the aforesaid conflict of views.