SUPREME COURT OF INDIA

Commissioner of Central Excise, Jalandhar

Vs.

Kay Kay Industries

C.A.No.7031 of 2009

(Anil R.Dave and Dipak Misra JJ.)

26.08.2013

JUDGMENT

DIPAK MISRA, J.

1. Leave granted in Special Leave Petition (C) No. 26499 of 2008.

2. The controversy that emerges for consideration in this batch of appeals, being consubstantial, was heard together and is disposed of by a common judgment. For the sake of convenience the facts from Civil Appeal No. 7031 of 2009 are set out herein.

3. The respondent-company availed deemed MODVAT credit of Rs.77,546/- during the quarter of March, 2000 on the strength of invoices issued by M/s. Sawan Mal Shibhu Mal Steel Re-Rolling Mills, Mandi Govindgarh. During MODVAT verification it was found that the supplier of inputs had not discharged full duty liability for the period covered by the invoices. The Competent Authority was of the view that appropriate duty of excise had not been paid by the manufacturer of inputs under the invoices on the strength of which the respondent took the benefit of deemed MODVAT credit and it was obligatory on the part of the respondent to take all reasonable steps to ensure that the appropriate duty of excise had been paid on the inputs used in the manufacture of their final product as required under Rule 57A(6) of the Central Excise Rules, 1944 (for short "the Rules") read with notification No. 58/97-CE(NT) dated 30.8.1997 and the aforesaid opinion of the Competent Authority persuaded him to issue a show-cause notice on 19.1.2001 proposing recovery of deemed MODVAT credit of Rs.77,546/- and imposition of penalty. The adjudicating authority, after receipt of

the reply to the show-cause notice, by order dated 22.3.2002, disallowed the deemed MODVAT benefit earlier availed and ordered for recovery of the said sum along with interest, and, further imposed penalty of Rs.40,000/-.

4. Being aggrieved by the aforesaid order the respondent preferred an appeal before the Commissioner (Appeals), Central Excise, Jalandhar, who ruled that the credit of deemed duty paid by the manufacturer under Section 3A of the Central Excise Act, 1944, (for brevity "the Act") was available subject to the condition that the inputs were received directly from the factory of manufacturer under cover of an invoice declaring therein that the appropriate duty of excise had been paid on such inputs under the provisions of the Act. The appellate authority referred to the provisions of sub-rule (6) of Rule 57A and notification No. 58/97-CE(NT) dated 1.9.1997 and opined that the manufacturer of the inputs had not discharged the appropriate duty liability against the goods cleared vide the invoices and the respondent had not furnished the requisite documentary evidence which could controvert the said allegation made against the manufacturer of inputs. The appellate authority observed that unless and until payment of appropriate duty had been made, the assessee could not have availed the benefit. Expressing such an opinion, it concurred with the view taken by the adjudicating authority. However, it reduced the penalty from Rs.40,000/- to Rs.20,000/-.

5. The unsuccess in appeal compelled the respondent to prefer Appeal No. E/1474/04-SM before the Customs, Excise and Service Tax Appellate Tribunal (for short "the tribunal") and the tribunal placing reliance on the decision in Vikas Pipes v. CCE[1] came to hold that the declaration given by the appellant therein satisfied the conditions enumerated in the notification for claiming the deemed MODVAT credit and, accordingly, quashed the orders passed by the adjudicating authority and that of the appellate authority.

6. Questioning the justifiability of the aforesaid order, Revenue preferred Civil Appeal No. 65 of 2006 before the High Court. The High Court reproduced the proposed substantial question of law which reads as follows: -

> "Whether the manufacturer of final products is entitled to deemed credit, under Notification 58/97-CE dated 30.8.97 when the manufacturer-supplier of inputs has not paid Central Excise Duty and given a wrong certificate on the body of invoices about duty dischargement under Rule 96ZP of Central Excise Rules, 1944?"

7. While dealing with the aforesaid substantial question of law, the High Court referred to its earlier decision in Vikas Pipes (supra) and distinguished the decision in Collector of Central Excise, Vadodara v. Dhiren Chemical Industries[2] and ultimately concurring with the view expressed by the tribunal dismissed the appeal. Hence, the present appeal by the Revenue.

8. Assailing the legal substantiality of the impugned judgment it is urged by Mr. Arjit Prasad, learned counsel for the appellant that the tribunal as well as the High Court has fallen into error in their interpretation of Rule 57A(6) of the Rules and the notification which imposes conditions, for as per the conditions enumerated in the notification it is obligatory on the part of the manufacturer of the final products to satisfy the adjudicating authority that appropriate duty of excise had been paid. The learned counsel would submit that the "appropriate duty" has been squarely dealt with by the Constitution Bench in the case of Dhiren Chemical Industries (supra) but the High Court has failed to appreciate the ratio laid down therein and distinguished the same in an extremely cryptic manner which makes the verdict sensitively susceptible.

9. Resisting the aforesaid submissions, Mr. Ajay Aggarwal, learned counsel for the respondent, has contended that the tribunal and the High Court have appositely relied upon the decision in Vikas Pipes (supra) and correctly opined that the respondent had satisfied the conditions enshrined in the notification and, therefore, there was no warrant to proceed for recovery of the benefit availed of by the final manufacturer. The learned counsel would submit that the "appropriate duty", as interpreted by this Court in Dhiren Chemical Industries (supra), supports the case of the respondent and the conditions prescribed in the notification having been satisfied, the adjudicating authority as well as the first appellate authority has erred in holding that there was a failure on the part of the respondent to satisfy the conditions.

10. To appreciate the rival submissions raised at the Bar and the bold assertion by Mr. Prasad, learned counsel for the Revenue, that it was the duty of the assessee-respondent, the manufacturer of the final products, to see that the manufacturer of the inputs had actually paid the appropriate duty on the inputs on the bedrock of law laid down by the Constitution Bench in Dhiren Chemical Industries (supra), it is necessary to understand how and under what circumstances the controversy travelled to the Constitution Bench. Be it noted, the Constitution Bench was required to resolve the conflict between the two pronouncements, namely, Collector of Central Excise, Patna v. Usha Martin Industries[3] and Motiram Tolaram and another v. Union of India and another[4].

11. In Usha Martin Industries (supra) the Court was interpreting the exemption notification dated 30.11.1963 as amended on 7.4.1981 and the question before the three learned Judges was whether the benefit of excise duty exemption (granted by the Central Government as per certain notifications) could be claimed in respect of commodities made out of raw material on which no excise duty was payable. The Central Government had exempted iron or steel products falling under a particular category made from certain materials or combination thereof. One of them was fresh unused re-rollable scrap on which the appropriate amount of duty of excise had already been paid. The Bench adverted to various aspects and, eventually, came to hold that the duty could legitimately be claimed by the assessee in respect of those goods referred to in the notification under consideration the raw material of which were not exigible to any excise duty at all.

12. In Motiram Tolaram (supra), another three-Judge Bench was dealing with notification No. 185 of 1983. It was a notification pertaining to exemption of alcohol falling under item 15-A of the First Schedule to the Central Excises and Salt Act, 1944 and manufactured from vinyl acetate monomer, from so much of the duty of excise leviable thereon under the said Act at the rate specified in the First Schedule, as in excess of the amount calculated at the rate of 10% ad valorem. The proviso to the notification stipulated that such polyvinyl alcohol was required to be manufactured from vinyl acetate monomer on which the appropriate amount of duty of excise under Section 3 of the Central Excises and Salt Act or the additional duty under Section 3 of the Customs Tariff Act, 1975, as the case may be, had been paid. A contention was raised before the Court that in India there was only one manufacturer of polyvinyl alcohol and the commodity in question could be produced only from vinyl acetate monomer and the Indian manufacturer was, in fact, paying duty at the rate of 10% ad velorem and that was the only duty which could be charged from the appellants therein. It was urged before the Court that the appellants were manufacturing that item in India from vinyle acetate monomer on which appropriate duty of excise had been paid and, therefore, the concessional duty should be charged from them. The learned Judges referred to the language employed in the exemption notification and opined that onus was on the assessee to prove and show that the conditions, as imposed in the exemption notification, had been satisfied. In that context the Bench proceeded to state that the condition for getting the benefit of the lower rate of duty is that on the raw material used appropriate amount of duty has been paid. If perchance or for any reason, the manufacturer of polyvinyl alcohol in India is unable to prove or show that the same has been manufactured from vinyl acetate monomer on which appropriate amount

of duty of excise has been paid, then the said manufacturer would not be entitled to get the benefit of the said notification.

13. Thereafter, the Court referred to Section 3 of the Customs Tariff Act, 1975 and observed that one has to assume that the importer of polyvinyl alcohol had actually manufactured the same in India. One can further assume, possibly without any difficulty, that the said polyvinyl alcohol has been manufactured from vinyl acetate monomer, but it is not possible to assume or presume or imagine that the raw material used is the one on which appropriate amount of duty of excise has been paid in India and hence, the condition which is contained in the said notification has to be fulfilled in order to get the benefit of the notification.

14. The Court further stressing on the purpose of the notification expressed thus: -

> "11. It appears to us that Excise Notification No. 185 of 1983 was deliberately worded in such a way that the importer of polyvinyl alcohol, who may not be able to prove that on the raw material appropriate duty in India has been paid, will not be able to get the benefit of the concessional rate of duty. It has to be borne in mind that the normal duty which is payable on polyvinyl alcohol is 40%. That is the rate of excise duty which would be payable by an Indian manufacturer of polyvinyl alcohol who is unable to show that he has complied with the condition contained in the proviso, namely, use in the manufacture of vinyl acetate monomer on which appropriate amount of duty has been paid. Similarly an importer of polyvinyl alcohol would be required to pay under Section 3 duty at the rate of 40% because on the polyvinyl alcohol imported duty under Section 3 of the Central Excises and Salt Act or additional duty under Section 3 of the Customs Tariff Act has not been paid on the vinyl acetate monomer used in the manufacture of polyvinyl alcohol. If it was possible to have shown that duty-paid vinyl acetate monomer had been used in the manufacture of imported polyvinyl alcohol, then the benefit of Excise Notification No. 185 of 1983 would have been available."

15. Eventually, the Court ruled that appropriate duty means the duty payable under the Central Excise and Salt Act or under the Customs Tariff Act and the condition had not been satisfied in the said case.

16. As a conflict was perceived in the aforesaid two judgments, it was referred to the Constitution Bench in Dhiren Chemical Industries (supra). The Constitution

Bench adverted to the law laid down in Usha Margin Industries and Motiram Tolaram (supra) and, eventually, opined thus: -

> "6. In the case of Motiram Tolaram reliance was placed upon the case of Usha Martin to contend that the appropriate duty being nil, because the raw material was not manufactured in India, it must be taken that appropriate duty had been paid and the appellants would be entitled to the benefit of the exemption notification in question, which used the said phrase. The Court was unable to agree. It said that the raw material being an item which was manufactured in India, a rate of excise duty was leviable thereon. On the raw material which had been imported, the appropriate amount of duty had not been paid. It was only if this payment had been made that the exemption notification would be applicable.
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> 7. In our view, the correct interpretation of the said phrase has not been placed in the judgment in the case of Usha Martin. The stress on the word "appropriate" has been mislaid. All that the word "appropriate" in the context means is the correct or the specified rate of excise duty.
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> 8. An exemption notification that uses the said phrase applies to goods which have been made from duty-paid material. In the said phrase, due emphasis must be given to the words "has already been paid". For the purposes of getting the benefit of the exemption under the notification, the goods must be made from raw material on which excise duty has, as a matter of fact, been paid, and has been paid at the "appropriate" or correct rate. Unless the manufacturer has paid the correct amount of excise duty, he is not entitled to the benefit of the exemption notification."

17. At this juncture, we are obliged to state that the factual and legal matrix in the case at hand is quite different. The decision proceeded on the language of the notifications. Moreover, we are not dealing with a notification for exemption. The controversy pertains to the interpretation of the notification No. 58/97-CE dated 30.8.1997 which has been issued in exercise of powers conferred by sub-rule (6) of Rule 57A of the Rules dealing with availing of MODVAT credit under certain circumstances subject to satisfaction of certain conditions precedent.

18. Before we advert to the notification it is necessary to refer to Rule 57A(1) and (6). The relevant part of Rule 57A(1) reads as follows: -

"57A: Applicability. – (1) The provisions of this section shall apply to such finished excisable goods (hereinafter referred to as the 'final products') as the Central Government may, by notification in the Official Gazette, specify in this behalf, for the purpose of allowing credit of any duty of excise or the additional duty under Section 3 of the Customs Tariff Act, 1975 (51 of 1975), as may be specified in the said notification (hereinafter referred to as the 'specified duty') paid on the goods used in or in relation to the manufacture of the said final products whether directly or indirectly and whether contained in the final product or not (hereinafter referred to as the 'inputs') and for utilizing the credit so allowed towards payment of duty of excise leviable on the final products, whether under the Act or under any other Act, as may be specified in the said notification, subject to the provisions of this section and the conditions and restrictions that may be specified in the notification:

i) Provided that the Central Government may specify the goods or classes of goods in respect of which the credit of specified duty may be restricted."

19. Sub-rule (6) of Rule 57A in exercise of which the notification has been issued is as follows:-

"(6) Notwithstanding anything contained in sub-rule (1), the Central Government may, by notification in the Official Gazette, declare the inputs on which the duty of excise paid under section 3A of the Central Excise Act, 1944 (1 of 1944), shall be deemed to have been paid at such rate or equivalent to such amount as may be specified in the said notification, and allow the credit of such duty in respect of the said inputs at such rates or such amount and subject to such conditions as may be specified in the said notification:

Provided that the manufacturer shall take all reasonable steps to ensure that the inputs acquired by him are goods on which the appropriate duty of excise as indicated in the documents accompanying the goods, has been paid under section 3A of the Central Excise Act, 1944 (1 of 1944)."

[Emphasis supplied]

20. On a careful reading of Rule 57A(1), it is clear as crystal that a manufacturer of final products can avail the credit of any duty of excise or the additional duty under Section 3 of the Customs Tariff Act, 1975, as may be specified by the notification

in the Official Gazette subject to provisions of the Section and the conditions and restrictions that may be specified in the notification. The proviso further stipulates that the Central Government may specify the goods or classes of goods in respect of which the credit of specified duty may be restricted. Thus, the conditions and restrictions have been left to be prescribed by way of notification in respect of certain classes of goods.

21. Sub-rule (6) of Rule 57A commences with a non-obstente clause and it empowers the Central Government to issue notification declaring the inputs on which the duty of excise paid under Section 3A of the Act to be deemed to have been paid at such rate or equivalent to such amount as may be specified in the said notification and allow the credit of such duty in respect of the said inputs at such rates or such amount and such conditions as may be specified in the notification. It is pertinent to state here that the proviso to the said Rule stipulates that the manufacturer shall take all reasonable steps to ensure that the inputs acquired by him are goods on which the appropriate duty of excise, as indicated in the documents accompanying the goods, has been paid. Thus, what is expected of an assessee is to take reasonable steps that appropriate duty, as indicated in the documents, has been paid.

22. At this juncture, it is relevant to refer to the notification issued under sub-rule (6) of Rule 57A on 30.8.1997. In the said notification iron and steel have been mentioned as goods notified for the purposes of credit of duty under MODVAT. The relevant clauses of the notification for the present purpose are clauses 2, 4 and 5 and, hence, they are reproduced below: -

> "2. The Central Government further declares that the duty of excise under the Central Excise Act, 1944 (1 of 1944) (hereinafter referred to as said Act), shall be deemed to have been paid (hereinafter referred to as deemed duty), on the inputs declared herein and the same shall be equivalent to the amount calculated at the rate of twelve per cent of the price, as declared by the manufacturer, in the invoice accompanying the said inputs (hereinafter referred to as invoice price), and credit of the deemed duty so determined shall be allowed to the manufacturer of the final products.
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> 4. The provisions of this notification shall apply to only those inputs which have been received directly by the manufacturer of the final products from the factory of the manufacturer of the said inputs under the cover of an

invoice declaring that the appropriate duty of excise has been paid on such inputs under the provisions of section 3A of the said Act.

5. The provisions of this notification shall not apply to inputs where the manufacturer of the said inputs has not declared the invoice price of the said inputs correctly in the documents issued at the time of their clearance from his factory."

[Emphasis supplied]

23. We have referred to the aforesaid notification in extenso as the controversy really rests on the understanding of the language employed in the notification. Clause (2) spells about the concept of deemed payment of duty on the inputs and further prescribes that it shall be equivalent to the amount calculated at the rate of twelve per cent of the price, as declared by the manufacturer, in the invoice accompanying the said inputs. Clause (3) deals with a different fact situation and, hence, it need not be dwelled upon. Clauses (4) and (5) are really relevant for the present purpose. On a plain reading of the said clauses it is clear to us that there are two mandates to avail the benefit of the said notification. One part is couched in the affirmative language and the other part is in the negative. As per the first part it is obligatory on the part of the assessee to produce the invoice declaring that the appropriate duty of excise has been paid on such inputs under the provision of section 3-A of the Act The second command, couched in the negative, is that the provisions of the said notification shall not apply to inputs where the manufacturer of the said inputs has not declared the invoice price of the said inputs correctly in the documents at the time of their clearance from his factory.

24. In the case at hand, there is no dispute that a declaration was given by the manufacturer of the inputs indicating that the excise duty had been paid on the said inputs under the Act. It is also not in dispute that the said inputs were directly received from the manufacturer but not purchased from the market. There is no cavil over the fact that the manufacturer of the inputs had declared the invoice price of the inputs correctly in the documents. It is perceivable from the factual matrix that the only allegation is that at the time of MODVAT verification it was found that the supplier of the inputs had not discharged full duty liable for the period covered under the invoices. This lapse of the seller is different and not a condition or rather a pre-condition postulated in the notification.

25. Mr. Prasad, learned counsel for the revenue has vehemently urged that it was requisite and, in a way imperative, on the part of the assessee to verify from the

concerned authority of the department whether the excise duty had actually been paid or not. The aforesaid submission leaves us unimpressed. As we notice Rule 57A (6) requires the manufacturer of final products to take reasonable care that the inputs acquired by him are goods on which the appropriate duty of excise as indicated in the documents accompanying the goods, has been paid. The notification has been issued in exercise of the power under the said Rule. The notification clearly states to which of those inputs it shall apply and to which of the inputs it shall not apply and what is the duty of the manufacturer of final inputs. Thus, when there is a prescribed procedure and that has been duly followed by the manufacturer of final products, we do not perceive any justifiable reason to hold that the assessee-appellant had not taken reasonable care as prescribed in the notification. Due care and caution was taken by the respondent. It is not stated what further care and caution could have been taken. The proviso postulates and requires "reasonable care" and not verification from the department whether the duty stands paid by the manufacturer-seller. When all the conditions precedent have been satisfied, to require the assessee to find out from the departmental authorities about the payment of excise duty on the inputs used in the final product which have been made allowable by the notification would be travelling beyond the notification, and in a way, transgressing the same. This would be practically impossible and would lead to transactions getting delayed. We may hasten to explicate that we have expressed our opinion as required in the present case pertaining to clauses 4 and 5 of the notification.

26. Consequently, we concur with the view expressed by the High Court and accordingly the appeals, being devoid of merit, stand dismissed without any order as to costs.

[1] 2003 (158) ELT 680 (P&H)
[2] (2002) 2 SCC 127
[3] (1997) 7 SCC 47
[4] (1999) 6 SCC 375