INDIRECT TAXES

Central Excise

1. Whether the manufacturers of concentrates are eligible to avail credit of the service-tax paid on advertising services, sales promotion, market research etc. availed by them and utilize such credit towards payment of excise duty on the concentrate? (Rule 2(l) of the CENVAT Credit Rules, 2004)

Coca Cola India Pvt Ltd. v. CCE (2009) 15 STR 657 (Bom)

The appellants manufactured non-alcoholic beverage bases also known as concentrates. This concentrate was sold by the appellants to bottling companies, who in turn sell the aerated beverages manufactured from the concentrates to distributors and who in turn sell it to retailers for the ultimate sale to the consumer. The advertisement and sales promotion activities including market research were undertaken by the appellant. The concentrate manufacturer claimed the credit of service tax on the advertising service used for marketing of soft drink removed by bottlers. However, the credit was denied on the ground that the advertisements did not relate to concentrates manufactured by the appellants. Bombay High Court held that though the contents of advertisements made by the appellants (the manufacturer of 'concentrates') essentially featured the 'bottle of aerated waters' (the bottles being the final products manufactured by bottlers and not by the appellants), the credit on advertising services received by the appellant could not be denied on the ground that the advertisement was not of the final product of the appellants (viz., 'concentrates'), but of the final product of the bottlers (viz. 'aerated waters').

The High Court laid down the following propositions –

(i) Five limbs of definition of 'input service' under rule 2(l)

The definition of ‘input service’ under rule 2(l) can be conveniently divided into the following five independent limbs:

- Any service used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products.

- Any service used by the manufacturer whether directly or indirectly, in or in relation to clearance of final products from the place of removal.

- Services used in relation to setting up, modernization, renovation or repairs of a factory, or an office relating to such factory.

- Services used in relation to advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs.

- Services used in relation to activities relating to business and outward transportation upto the place of removal. Each of the aforementioned limbs of the said definition is an independent benefit/concession. If an assessee satisfies any one of the above limbs, then credit on input service would be admissible even if the assessee does not satisfy the other limbs.

(ii) Interpretation of certain expressions used in the definition of “input service”

(a) Expression “means” and “includes”

Above two expressions are exhaustive. By the word “includes”, services which may otherwise have not come within the ambit of the definition clause are covered and by the word “means”, these are made exhaustive.

(b) Expression “such as”

The words “such as” are illustrative and not exhaustive. In the context of business, it refers to those services which are related to the business.

(iii) Interpretation of the phrase “activities relating to business”

The phrase “activities relating to business” are words of wide import.

(a) The word ‘business’ is of wide import and cannot be given a restricted definition to say that business of a manufacturer is to manufacture final products only. In the present case, the business of the appellant would include, apart from manufacture of concentrates, entering into franchise agreements with bottlers, permitting use of brand name, promotion of brand name, etc.

(b) The expression ‘relating to’ further widens the scope of the expression ‘activities relating to business’.

(c) The expression ‘activities’ further widens the scope of the aforesaid expression. Rule making authority has not employed any qualifying words before the word ‘activities’, like main activities or essential activities etc. It implies that all activities (essential or not) in relation to a business would fall within the ambit of input service. Hence, in the present case all activities having a relation with the manufacturer of the concentrate would fall within the definition of input service.

(iv) Input services forming part of value of final product eligible for CENVAT credit Service tax is a value added tax and a consumption tax and the burden of service tax must be borne by the ultimate consumer and not by any intermediary i.e. the manufacturer or service provider. In order to avoid the cascading effect, CENVAT credit on input stage goods and services must be allowed as long as a connection between the input stage goods and services is established. Conceptually as well as a matter of policy, any input service that forms a part of value of final product should be eligible for the benefit of CENVAT credit. In the present case, since the advertising cost forms part of the assessable value, the assessee is eligible to take credit of tax paid on advertising services.

(v) Credit allowed in case of existence of relationship between input service and final product So long as the manufacturer can demonstrate that the advertisement services availed have an effect or impact on the manufacture of the final product and establish the relationship between the input service and the manufacture of final product, credit must be allowed. In the present case, the Court held that the advertisement of soft-drink enhanced the marketability of the concentrate.

2. Whether an assessee would be entitled to claim CENVAT credit in cases where it sells electricity outside the

factory to the joint ventures, vendors or gives it to the grid for distribution? (Rule 2(k) of the CENVAT Credit Rules, 2004)

Maruti Suzuki Ltd. v CCE (2009) 240 ELT 641 (SC)

The assessee was engaged in the manufacture of electricity using naptha as fuel for generation of electricity. The electricity was partly used captively and partly sold outside to its joint ventures, vendors or given to the grid for distribution. The assessee claimed the CENVAT credit on the naptha used in the manufacture of the electricity. However, Department denied the credit on the ground that CENVAT credit on naptha could not be admitted because part of the electricity was cleared outside the factory to the joint ventures, vendors etc

The Court observed that the statutory definition of the word "input" in rule 2(g) in the erstwhile CENVAT Credit Rules, 2002 [now rule 2(k) in the CENVAT Credit Rules, 2004], can be divided into three parts, namely :

(i) Specific part

(ii) Inclusive part

(iii) Place of use

All the three parts of the definition, namely, specific part, inclusive part and place of use, are required to be satisfied before an input becomes an eligible input.

(I) SPECIFIC PART

"Input" is defined to mean all goods, except light diesel oil, high speed diesel oil and petrol, used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not.

Therefore, the crucial requirements, as per this part, are as follows:-

(a) All goods “used in or in relation to the manufacture” of final products qualify as “input”.

(b) Presupposition that the element of “manufacture” must be present.

On account of the use of the expression “used in or in relation to the manufacture of final product”, use of input in the manufacturing process, be it direct or indirect and the absence of the input in the final product become irrelevant. Electricity may not have any concern with the manufacture of the finished product, but it is an ancillary activity which is anterior to the process of manufacture of the final product. It is on account of the use of the above expression “used in relation to manufacture” that such an activity of electricity generation comes within the ambit of the definition.

(II) INCLUSIVE PART

Input includes:

(a) Lubricating oils, greases, cutting oils and coolants;

(b) Accessories;

(c) Paints;

(d) Packing materials;

(e) Input used as fuel;

(f) Input used for generation of steam or electricity.

The Court elucidated that, in each case, it has to be established that inputs mentioned in the inclusive part is “used in or in relation to the manufacture of final product”. Unless and until the said input is used in or in relation to the manufacture of final product within the factory of production, the said item would not become an eligible input. Hence, Supreme Court held that the definition of “input” brings within its fold, inputs used for generation of electricity or steam, provided such electricity or steam is used within the factory of production for manufacture of final products or for any other purpose. The excess electricity cleared to the grid for distribution or to the joint ventures, vendors, and that too for a price (sale),

electricity generated cannot be said to be “used in or in relation to the manufacture of

final product, within the factory”.

Hence, it could be inferred that the assessee was entitled to credit on the eligible inputs utilized in the generation of electricity to the extent to which they were using the produced electricity within their factory (for captive consumption). They were not entitled to CENVAT credit to the extent of the excess electricity cleared at the contractual rates in favour of joint ventures, vendors etc., which was sold at a price.

3. Whether aluminium dross and skimmings have become excisable in view of the insertion of Explanation to section 2(d) of the Central Excise Act, 1944 by the Finance act, 2008? (Explanation to section 2(d) of the Central Excise Act, 1944)

Hindalco Industries Ltd. UOI 2009 (243) E.L.T. 481 (All.)

The assessee submitted that insertion of the explanation to section 2(d) would not change the position established in law that ‘aluminium dross and skimming,’ were neither processed or manufactured, or were marketable commodities. The High Court observed that effect of the explanation is to get over the judgment of the Apex Court in case of Commissioner, Central Excise v. Indian Aluminium Co. Ltd. 2006 (203) E.L.T. 3 (S.C.) wherein the Supreme Court held that everything that can be sold is not necessarily marketable.

The High Court elucidated that, prima facie, the insertion of the explanation under section 2(d) providing for a fiction in law by a deeming clause in definition of “goods” to include any article, material or substance which is capable of being bought and sold for a consideration, and to treat such goods as marketable, would make the ‘aluminium dross and skimming’ liable to excise duty.

Where the goods are specified in the Tariff, they can be subjected to duty, if they are produced, or manufactured by the person on whom duty is ‘proposed’. The High Court noted that the expression has been explained by the Supreme Court to mean that the goods so produced must satisfy the test of marketability. The excise duty is levied on production

and manufacture which means bringing out a new commodity, substance, and it is implicit that such goods must be usable, saleable and marketable. If the goods are marketable or are deemed to be marketable, as on now by the explanation added to section 2(d), such goods included in the Tariff would attract excise duty.

4. Is the assessee liable to pay interest under section 11AB on the differential duty paid on the difference between price at date of removal and enhanced price at which goods are ultimately sold? (Section 11A(2B) and section 11AB of the Central Excise Act, 1944)

CCE v. International Auto Ltd. 2010 (250) E.L.T. 3 (S.C.)

The Apex Court, following the decision made in the case of CCE v. S.K.F. India Limited 2009 (239) E.L.T. 385 (S.C.), observed that sub-section (2B) of section 11A provides that the assessee in default may make payment of the unpaid duty on the basis of his own ascertainment or as ascertained by a Central Excise Officer and, in that event, such assessee in default would not be served with the demand notice under section 11A(1) of the Act. However, Explanation 2 to the sub-section (2B) of section 11A makes it clear that such payment would not be exempt from interest chargeable under section 11AB of the Act. What is stated in Explanation 2 to section 11A(2B) is reiterated in section 11AB of the Act, which deals with interest on delayed payment of duty.

From the scheme of section 11A(2B) and section 11AB of the Act, it becomes clear that interest is levied for loss of revenue caused on any count. In the present case, the price, on the date of removal/clearance of the goods, was not correct i.e. it was understated. The enhanced duty was leviable on the corrected value of the goods on the date of removal. When the differential duty was paid after the date of clearance, it indicated short-payment/short-levy on the date of removal, hence, interest which was for loss of revenue, became leviable under section 11AB of the Act.

Note: Relevant portions of section 11A(2B), explanation 2 to section 11A(2B) and section 11AB read as follows: Section 11A(2B)

Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person, chargeable with the duty, may pay the amount of duty [on the basis of his own ascertainment of such duty

or on the basis of duty ascertained by a Central Excise Officer] before service of notice on him under sub-section (1) in respect of the duty, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the duty so paid. Explanation 2 to section 11A(2B)

For the removal of doubts, it is hereby declared that the interest under section 11AB shall be payable on the amount paid by the person under this sub-section and also on the amount of short-payment of duty, if any, as may be determined by the Central Excise Officer, but for this sub-section. Section 11AB Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person who is liable to pay the duty as determined under sub-section (2), or has paid the duty under sub-section (2B), of section 11A, shall, in addition to the duty, be liable to payinterest at such rate not below ten per cent and not exceeding thirty-six per cent. per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette, from the first date of the month succeeding the month in which the duty ought to have been paid under this Act, or from the date of such erroneous refund, as the case may be, but for the provisions contained in subsection (2), or sub-section (2B), of section 11A till the date of payment of such duty. Section 2(f) of the Central Excise Act, 1944

5. Whether the fabrication, assembly and erection of waste water treatment plant amounts to manufacture?

Larsen & Toubro Limited v. UOI 2009 (243) E.L.T. 662 (Bom.)

The assessee was engaged in fabrication, assembly and erection of waste water treatment plant. As per the assessee, the plant could not function as such until it was wholly built including the civil construction. Since, after being completely built, waste water treatment plant became immovable, duty could not be levied on it. However, the Department alleged that the assessee had fabricated/manufactured the waste water treatment plant. It further alleged that waste water treatment plant came into existence in an unassembled form before the same was installed and assembled to the ground with civil work. It became operational after it was embedded in the civil work and, therefore, the excise duty was payable on it.

The High Court opined that mere bringing of the duty paid parts in an unassembled form at one place, i.e. at the site does not amount to manufacture of a plant. Simply collecting together at site the various parts would not amount to

manufacture unless an excisable movable product (say a plant) comes into existence by assembly of such parts. In the present case, as the petitioner had stated that the waste water treatment plant did not come into existence unless all the parts were put together and embedded in the civil work. Waste water treatment plant did not become a plant until the process which included the civil work, was completed. Thus, the Court held that no commercial movable property came into existence until the assembling was completed by embedding different parts in the civil works.

6. Whether the theoretical possibility of product being sold is sufficient to establish the marketability of a product?

Bata India Ltd. v. CCE 2010 (252) ELT 492 (SC)

The Apex Court observed that marketability is essentially a question of fact to be decided on the facts of each case and there can be no generalization. The test of marketability is that the product which is made liable to duty must be marketable in the condition in which it emerges. The question is not whether there is a hypothetical possibility of a purchase and sale of the commodity, but whether there is sufficient proof that the product is commercially known. The mere theoretical possibility of the product being sold is not sufficient but there should be commercial capability of being sold. Theory and practice will not go together when one examine the marketability of a product.

The Supreme Court further ruled that the burden to show that the product is marketed or capable of being bought or sold is entirely on the Revenue. Revenue, in the given case, had not produced any material before the Tribunal to show that the product was either been marketed or capable of being marketed, but expressed its opinion unsupported by any relevant materials.

Note: The above judgment is in conformity with the explanation to section 2(d) of the Central Excise Act, 1944 inserted by the Finance Act, 2008.

7. Whether the machine which is not assimilated in permanent structure would be considered to be moveable

so as to be dutiable under the Central Excise Act?

CCE v. Solid & Correct Engineering Works and Ors 2010 (252) ELT 481 (SC)

The asseseee was engaged in the manufacture of asphalt batch mix and drum mix/hot mix plant by assembling and installing its parts and components. The Court observed that as per the assessee, the machine was fixed by nuts and bolts to a foundation not because the intention was to permanently attach it to the earth, but because a foundation was necessary to provide a wobble free operation to the machine.

The Court opined that an attachment where the necessary intent of making the same permanent is absent cannot constitute permanent fixing, embedding or attachment in the sense that would make the machine a part and parcel of the earth permanently.

Hence, the Supreme Court held that the plants in question were not immovable property so as to be immune from the levy of excise duty. Consequently, duty would be levied on them.

8. Whether CENVAT credit can be denied on the ground that the weight of the inputs recorded on receipt in the premises of the manufacturer of the final products shows a shortage as compared to the weight recorded in the relevant invoice? (Rule 3(1) of the CENVAT Credit Rules, 2004)

CCE v. Bhuwalka Steel Industries Ltd. 2010 (249) ELT 218 (Tri-LB)

The large bench of the Tribunal held that each case had to be decided according to merit and no hard and fast rule can be laid down for dealing with different kinds of shortages. Decision to allow or not to allow credit under rule 3(1), in any particular case, will depend on various factors such as the following:-

(i) Whether the inputs/capital goods have been diverted en-route or the entire quantity with the packing intact has been received and put to the intended use at the recipient factory.

(ii) Whether the impugned goods are hygroscopic in nature or are amenable to transit loss by way of evaporation etc.

(iii) Whether the impugned goods comprise countable number of pieces or packages and whether all such packages and pieces have been received and accounted for at the receiving end.

(iv) Whether the difference in weight in any particular case is on account of weighment on different scales at the despatch and receiving ends and whether the same is within the tolerance limits with reference to the Standards of Weights and Measures Act, 1976.

(v) Whether the recipient assessee has claimed compensation for the shortage of goods either from the supplier or from the transporter or the insurer of the cargo.

Tolerances in respect of hygroscopic, volatile and such other cargo has to be allowed as per industry norms excluding, however, unreasonable and exorbitant claims. Similarly, minor variations arising due to weighment by different machines will also have to be ignored if such variations are within tolerance limits.

9. Does the activity of packing imported compact discs in a jewel box along with inlay card amount to manufacture under section 2(f) of the Central Excise Act, 1944 ? (Section 2(f) of the Central Excise Act, 1944)

CCE v. Sony Music Entertainment (I) Pvt. Ltd. 2010 (249) E.L.T. 341 (Bom.)

The appellant imported recorded audio and video discs in boxes of 50 and packed each individual disc in transparent plastic cases known as jewel boxes. An inlay card containing the details of the content of the compact disc was also placed in the jewel box. The whole thing was then shrink wrapped and sold in wholesale. The Department contended that the said process amounted to manufacture.

The High Court observed that none of the activity that the assessee undertook involved any process on the compact discs that were imported. It held that the Tribunal rightly concluded that the activities carried out by the respondent did

not amount to manufacture since the compact disc had been complete and finished when imported by the assessee. They had been imported in finished and completed form.

10. Whether the product "Scrabble" is classifiable under sub-heading 9503.00 or sub-heading 9504.90 of the First Schedule to the Central Excise and Tariff Act, 1985? (Classification of goods under excise)

Pleasantime Products v. CCE 2009 (243) E.L.T. 641 (S.C.)

According to the assessee, "Scrabble" was a puzzle or in the alternative it was an educational toy falling under sub-heading 9503.00. However, Revenue alleged that "Scrabble" was not a puzzle, it was not a toy but a game. Moreover, since "Scrabble" has board(s) and pieces it was classifiable under sub-heading 9504.90. The Court opined that "Scrabble" was not a puzzle/crossword. The difference between a "game" and a "puzzle" is brought out by three distinct features, viz., outcome, clue-chance and skill. In a puzzle, the outcome is fixed or pre-determined which is not there in "Scrabble". In a "Scrabble" there are no clues whereas in crossword puzzle, as stated above, words are written according to clues. Hence, the essential characteristic of crossword to lay down clues and having a solution is

absent from "Scrabble". Thus, "Scrabble" would not fall in the category or class mentioned in sub-heading 9503.00, namely, "puzzles of all kinds". As per the dictionary meaning, "Scrabble" is a board game in which players use lettered tiles to create words in a crossword fashion. Applying the dictionary meaning, the Apex Court held that

"Scrabble" was a board game. It was not a puzzle. In the circumstances, it would fall under heading 95.04 and not under sub-heading 9503.00 of the CETA.

Note - The headings cited in the case law mentioned above may not co-relate with the headings of the present Excise Tariff as it relates to an earlier point of time.

11. Whether penalty can be imposed on the directors of the company for the wrong CENVAT credit availed by the company? (Rule 15(1) of the CENVAT Credit Rules, 2004)

Ashok Kumar H. Fulwadhya v. UOI 2010 (251) E.L.T. 336 (Bom.)

It was held that words "any person" used in rule 13(1) of the erstwhile CENVAT Credit Rules, 2002 [now rule 15(1) of the CENVAT Credit Rules, 2004] clearly indicate that the person who has availed CENVAT credit shall only be the person liable to the penalty. The Court observed that, in the instant case, CENVAT credit had been availed by the company and the penalty under rule 13(1) [now rule 15(1)] was imposable only on the person who had availed CENVAT credit [company in the given case], who was a manufacturer. The petitioners-directors of the company could not be said to be manufacturer availing CENVAT credit.

12. Is the Settlement Commission empowered to grant the benefit under the proviso to section 11AC in cases of settlement?

Ashwani Tobacco Co. Pvt. Ltd. v. UOI 2010 (251) E.L.T. 162 (Del.)

The Court ruled that benefit under the proviso to section 11AC could not be granted by the Settlement Commission in cases of settlement. It elucidated that the order of settlement made by the Settlement Commission is distinct from the

adjudication order made by the Central Excise Officer. The scheme of settlement is contained in Chapter-V of the Central Excise Act, 1944 while adjudication undertaken by a Central Excise Officer is contained in the other Chapters of the said Act. Unlike Settlement Commission, Central Excise Officer has no power to accord immunity from prosecution while determining duty liability under the Excise Act.

Once the petitioner has adopted the course of settlement, he has to be governed by the provisions of Chapter V. Therefore, the benefit under the proviso to section 11AC, which could have been availed when the matter of determination of duty was before a Central Excise Officer was not attracted to the cases of a settlement, undertaken

under the provisions of Chapter-V of the Act.

13. Can a commission agent also acting as a consignment agent be covered under the definition of 'clearing and forwarding agent'?

CCE v. Mahaveer Generics 2010 (17) S.T.R. 225 (Kar.)

The assessee contended that activity carried on by him came within purview of 'commission agent' and not under the 'clearing and forwarding agent'. The Court elucidated that assessee in question had not restricted its activities to business of commission agency, but had also carried on business as consignment agent. Since the consignment agent had been brought under statutory definition of 'clearing and forwarding agent' by inclusive clause, the High Court held that the assessee falls under the definition of 'clearing and forwarding agent' after considering the following points:-

• Agreement itself termed the assessee as a consignment agent.

• Price was mutually decided by the principal and the agent (assessee). Had the assessee been merely a commission agent, price determination would not have been within his domain.

• Since assessee had been given the authority and power to appoint dealers, stockists and distributors, it implied that it was not merely a commission agent.

• Mere procurement of purchase orders was not involved, but stored goods were also cleared and forwarded to stockists and dealers by the assessee.

14. Is the want of evidence from foreign supplier enough to cancel the confiscation order of goods undervalued?

CCus. v. Jaya Singh Vijaya Jhaveri 2010 (251) E.L.T. 38 (Ker.)

In the instant case, the High Court held that in a case of confiscation of goods because of their under valuation, Tribunal could not cancel the confiscation order for the want of evidence from the foreign supplier. The Court considered it be illogical that a person who was a party to undervaluation would give evidence to the Department to prove the case that the invoice raised by him on the respondent was a bogus one and that they had received underhand payment of the differential price. Resultantly, the Court upheld the confiscation order.

Other Cases (Detailed)

1. 100% EOU is entitled to benefit of refund of Cenvat Credit under rule 5 of Cenvat Credit Rules, even if the final products are exempted

Facts

The respondent is a 100% Export Oriented Unit ('EOU' for short) engaged in the manufacture of parts of agricultural and farm equipment which

are chargeable to 'Nil' rate of duty under Central Excise Tariff Act, 1985 (Tariff Act). The respondent filed three refund claims with the Assistant Commissioner of Customs, Bengaluru under Rule 5 of the Cenvat Credit Rules, 2004, being the unutilised credit availed by the respondent in respect of certain inputs used in the manufacture and export of their final product. The said refund claims were, however, rejected by the Assistant Commissioner, Customs, on the ground that the respondent was not eligible for the availment and utilisation of Cenvat Credit Rules, 2004, as their final product was not chargeable to any duty under the Tariff Act. It was, further, held that Rule 6(6) of the Cenvat Credit Rules, 2004 exempting a unit from proportionate reversal of Cenvat credit on clearance of exempted goods when exported under bond without payment of duty, could not be extended to the respondent, as the exports made by EOU were not covered under the Rule. Being aggrieved by the same, the respondent filed an appeal before the Commissioner of Customs (Appeals) who set aside the Order of the Assistant Commissioner, Customs. The appeal filed by the Revenue against the order of Commissioner (Appeals) before the Tribunal was also dismissed based on an earlier judgment on an identical issue. Hence, the revenue is in appeal before the CESTAT.

Held

High Court rejected the appeal of the revenue primarily on the ground that the Tribunal has dismissed the revenue's appeal based on the reasoning of its earlier order on an identical issue, the appeal against which was dismissed by this very High Court. As there was nothing on record to show that the revenue has filed an appeal against this order of High Court before the Apex Court and/or the Apex Court has stayed the operation of earlier order in any manner, the earlier order has attained finality and the issue is no longer res integra between the parties.

Authority

Commissioner of Customs, Bengaluru vs. ANZ International – 2009 (243) E.L.T. 40 (Kar-HC)

2. Cenvat credit on common inputs eligible only in terms of rule 6 when excisable & exempted products are manufactured. Credit can be availed only in terms of rule 6(3) and reversal of pro rata credit not permissible. Judgment of Chandrapur Magnet distinguished by Hon'ble Bombay High Court

Facts

The respondents are engaged in the manufacture of Vitamin A falling under Chapter Heading 29.36 and animal food supplement falling under Chapter Heading 23.02 of the Schedule to the Central Excise Tariff Act, 1985. Vitamin A is liable to Central Excise Duty. Animal food supplement is not liable for payment of Central Excise Duty since Heading 23.02 attracts nil rate of duty. The Cenvat credit on common inputs utilized in manufacture of aforesaid final products was availed by the respondent during the period of dispute. At the time of clearance of exempted finished goods (i.e. Animal food supplement), the proportionate credit relating to inputs utilized in manufacture of the said exempted final products was reversed. However, Revenue issued a show cause notice demanding 8% of the value of the exempted final products in

terms of Rule 57CC(1) of the Central Excise Rules, 1944/Rule 6(3)(b) of the Cenvat Credit Rules, 2004. The said notice was adjudicated and the same was confirmed by the Commissioner. In an appeal before the Tribunal, the matter was allowed on majority by the larger bench. Revenue is in appeal before the Hon'ble High Court against this order of the Tribunal.

Held

The Bombay High Court agreed with the position adopted by the revenue and held that in absence of any provision allowing proportionate reversal of credit availed in respect of common inputs in Rule 57CC of the Central Excise Rules, 1944 or Rule 6 of Cenvat Credit Rules 2004, It would be imperative on the respondent to pay an amount equal to 8% of the value of exempted final products in terms of Rule 57CC(1) of the Central Excise Rules, 1944/Rule 6(3)(b) of Cenvat Credit Rules, 2004, in the event the respondent did not opt to maintain separate accounts in respect of inputs utilized in manufacture of exempted final products. The Bombay High Court strictly interpreted Rule 57CC of the Central Excise Rules, 1944/Rule 6 of Cenvat Credit Rules, 2004 to hold that a mere reversal of proportionate credit would not comply with the requirements of aforesaid Rule.

Authority

Commissioner of Central Excise, Thane-I V. Nicholas Piramal (India) Ltd. – 2009 (244) ELT 321 (Bom HC)

3. Reversal of Cenvat Credit in the event of reduction of price after the supply of goods

Facts

Appellant is engaged in the manufacture of motorcycle, auto rickshaw, etc. and are availing Cenvat credit on the inputs received in its factory. The inputs are supplied by various independent suppliers under contracts backed by the purchase orders for agreed prices. Appellant availed credit on these inputs based on proper duty paying documents. However, subsequent to the supplies, there was a retrospective reduction in the prices of such inputs. Revenue therefore sought to deny the credit proportionate to the subsequent extinction in prices of inputs. On adjudication, the adjudicating authority confirmed the aforesaid denial of credit along with applicable interest and penalty. Aggrieved with the said order, appellant filed an appeal before the Tribunal.

Held

The Tribunal held that a manufacturer is eligible for credit of the 'duty paid' on inputs and not "duty payable'. The Tribunal further held that there is no provision in excise laws for the re-assessment of the duty paid on inputs at the recipient's end. It is obligatory on the revenue to re-assess the duty at supplier's end in order to recover differential duty therefrom rather than denying credit to the input recipient. Therefore it was held

that the credit has been correctly availed and the appellant is not required to reverse any part thereof (proportionate to the extinction in price).

Authority

Bajaj Auto Ltd. vs. Commissioner of Central Excise – 2009 TIOL 1735

4. No obligation on the DTA unit to reverse the accumulated balance of Cenvat credit at the time of its conversion into EOU

Facts

Appellant is engaged in the manufacture of pharmaceutical products and bulk drugs falling under Chapter 29 of Central Excise Tariff Act. It avails credit on inputs, packing materials, etc. The unit was converted into 100% EOU and its entire stock of inputs was transferred to EOU without reversing the credit availed thereon. A show cause notice was issued demanding the reversal of the credit availed on inputs which were transferred to EOU on conversion of DTA unit. On adjudication, the demand was confirmed along with the applicable interest and penalty. Commissioner (Appeals) also upheld the adjudication order. Appellant therefore challenged the appellate order before the Tribunal.

Held

The Tribunal held that inputs on which credit availed was availed by the DTA unit were never removed from the premises of the DTA unit at the time of its conversion into an EOU. Thus, there was no contravention of any of the provisions of Cenvat Credit Rules, 2004. Further, no provision contained in the Cenvat Credit Rules, 2004 contemplates reversal of credit availed on inputs by a DTA unit at the time of its conversion into EOU.

Authority

Sun Pharmaceutical Industries Ltd. vs. Commissioner of Central Excise, Puducherry – 2009 TIOL 1613

5. Cenvatnot deniable on moulds sent to job work erroneously mentioning rule 4(5)a instead of rule 4(5)b

Facts

Appellants are engaged in the manufacture of mosquito repellants & apparatus falling under Chapter 85 & 38 respectively. Appellants availed credit on two injection moulds and the same was cleared for job work under rule 4(5)a. The said moulds were not returned within 180 days and a show cause notice was came to be issued proposing to recover the credit availed and to impose penalty. Original authority confirmed the demand and imposed equal amount of penalty. In an appeal to Commissioner (Appeals) the said order was upheld on the ground that the moulds are parts of capital goods. Hence an appeal before CESTAT.

Held

Hon'ble CESTAT held that the moulds can be sent to job-work under rule 4(5)b and the time limit of 180 days for returning the same is not applicable to the said rule. Merely mentioning the rule 4(5)a erroneously, the benefit of cenvatcredit cannot be denied.

Authority: Karamchand Appliances Pvt. Ltd vs CCE.

2010(251) ELT 67 (T-Delhi).

6. Supplies to SEZ Developers/ units are "Exports". Demand of 10% of amount, treating such goods as "Exempted goods", not sustainable. Prima facie case made out , pre-deposit waived.

Facts

Applicants are the DTA Unit supplied goods to SEZ Developers. Dept. has issued notices for demand of 10% of amount of value of such clearance under rule 6(3)b of CenvatCredit Rules, treating the said goods as exempted goods and having not maintained the separate account. Hence the appeal before CESTAT.

Held

Hon'ble Tribunal held that the goods supplied to SEZ cannot be treated as "exempted Goods". It is also held that the supply to SEZ is "Export" and hence the rule 6(3)b will not be applicable, relying on the Board Circular No. 29 of 2006 dated 31-12-2006.

Authority: Nu-Chem Ltd vs Commissioner of Central Excise 2010(251) ELT 63(T).

7. Settlement of case application maintainable only if duty liability disclosed is accepted. Appellant cannot be permitted to dissect the settlement Commission order to accept what is favourable to them and reject what is not.

Facts

Appellant is an importer and ship repair unit registered with the Director General of Shipping. The investigations revealed that the appellants have clandestinely availed benefit of exemption Notification No. 211/83-Cus dated 23-7-1983 on the import of multiple consignments of Engineering Cargo as ship stores. A show-cause notice was issued totalling Rs. 68.78 lakhs and upon adjudication, the said amount was confirmed with equal amount of penalty. Settlement Commissioner settled the case directing the appellant to pay the entire duty amount and penalty in excess of Rs. 18 lakhs. However the appellants took the matter to High Court and raised the additional grounds that the customs duty was not payable. However the Hon'ble High Court dismissed the petition as a fresh ground cannot be entertained. Appellants challenged the said decision of High Court before the Apex Court.

Held

The Apex Court held that the additional ground which was not before the Settlement Commission cannot be taken before the Apex Court. It was also held that appellant cannot be permitted to dissect the Settlement Commission's order with a view to accept what is favourable to them and reject what is not.

Authority: Sanghvi Reconditioners Pvt. Ltd. vs Union of India

2010(125) ELT 3(SC)

8. Board circular cannot override exemption Notification issued Section 37B of Central Excise Act 1944.

Facts

Appellants, a 100% Export Oriented Unit. Appellants were procuring LDO under CT3 certificates without payment of duty under Notification No. 22/2003-CEdated 31-3-2003. This facility was withdrawn by Circular No.796/29/2004 dated 4.9.2004 and it was clarified that 100% EOU can avail cenvatcredit. Appellants thereafter bought LDO on payment of duty and filed a rebate claim for the duty paid. Same was rejected on the ground that the LDO is excluded from the definition of input.

Held

Hon'ble CESTAT held that the benefit which was extended by the notification cannot be denied by board circular when the notification was in

force. Therefore rebate claim is eligible to appellants.

Authority

Hindustan Uniliver Ltd vs CCE-2010 (250) ELT 92 (T-Ahmd)

Other Decisions (Quick Analysis)

1. Proviso to section 3(1) of Central Excise Act – DTA clearance

Customs duty once determined and education cess on whole of customs duty is added, question of adding education cess again does not arise for the clearance to DTA by Export Oriented Unit.

Sarla Performance Fibres Ltd vs. Commissioner of Central Excise, Vapi- 2010 (253) ELT 203 (T-A'bad).

2. Rule 2(a) & Rule 2(k) – Cenvat Credit Rules, 2004

Cement & steel items used for laying of foundation and for building structure support not covered under inputs even for the period before amendment from 7-7-2009 — Credit not admissible.

Vandana Global Ltd. vs. Commissioner of Central Excise – 2010 (253) ELT 440 (T-LB).

3. Rule 5-Refund under Cenvat Credit Rules, 2004

Refund of Cenvat credit admissible on export of exempted goods.

Commissioner of Central Excise vs. Drish Shoes Ltd. – 2010(254) ELT 417 (HP-HC).

4. Rule 6(3) of Cenvat Credit Rules – Clearance under Served from India Scheme (SFIS), not an exempted clearance

Manufacture and clearance of goods under SFIS at NIL rate of duty would not amount to exempted clearance. Not liable to pay 10% under the cenvat Credit Rule.

Universal Power Transformers Pvt. Ltd. vs. CCE, Bengaluru – 2010-TIOL-985-CESTAT- Bengaluru.

5. Rule 14 of Cenvat Credit Rules – Interest not chargeable if cenvat not utilised

Interest not chargeable when the wrongly availed cenvat credit not utilised.

Indo Shell Mould Ltd. vs. CCE-2010 (253) ELT 799 (T- Chennai).

6. Rule 209A – Penalty under erstwhile Central Excise Act, 1944

Transporters abetting in passing on fake Modvat documents liable to penalty. Transporters had issued blank LR books and thus helped dealers to raise bogus/fake modvatable documents to enable buyers to avail modvat credit.

Commissioner of Central Excise vs. Deepak Roadways – 2010-TIOL-492-HC-P& H.

7. Section 3 – Dutiability of DTA clearance

EOU not liable to pay duty under Excise section 3 on DTA clearance of non-excisable goods.

Commissioner of Central Excise vs. Sesame Foods – 2010(254) ELT 504 (T-Delhi).

8. Section 4A – Assessment under Central Excise Act, 1944

Provisional assessment not applicable to MRP based assessments under section 4A of Central Excise Act 1944.

Kinetic Engg Ltd vs. CCE, Pune-2010 (254)289 (T-Mumbai).

9. Sections 9 & 32E – Prosecution under Central Excise

Prosecution cannot continue when application for settlement pending.

Sanghvi Electronics Pvt. Ltd. vs. State of Maharashtra – 2010 (254) ELT 206 (Bom-HC).

10. Section 11A of Central Excise Act, 1944- Clandestine removal & demand

Show cause notice issued on the presumption that entries, as recorded in private note book maintained by labour contractor, should be taken as the clearance figures of finished products from the factory – Such presumption not permissible in the absence of any corroborating reliable and independent evidence.

CCE vs. Lords Chemicals Ltd. 2010(258) ELT 48 (Cal-HC).

11. Rule 14 of Cenvat credit rules.-No Interest if cenvat credit availed and not utilised.

Cenvat credit wrongly availed & Reversal of credit without utilization. In that view, assessee not required to pay interest on wrongly availed credit on its reversal.

CCE vs. M.J.Pharmaceutical Industries Ltd.-2010 (258) E.L.T. 38 (Guj-HC.)

12. Section 11A-Recovery of dues – GIDC cannot seek to recover Central Excise dues

GIDC is entitled to seek satisfaction of its dues before effecting transfer of immovable property in favour of Petitioners - However GIDC cannot seek to recover dues of Central Excise Department by asking the Petitioners to obtain an NOC from Central Excise Department.

Sureshkumar M. Bhingardia vs. Union of India- 2010 (258) E.L.T. 28 (Guj-HC.)

13. Rule 4(5) of Cenvat Credit Rules, 2004-Principal manufacturer eligible for Cenvat Credit.

Principal manufacturer sending inputs to job worker without reversal of credit thereon – Job worker returning them on payment of duty and principal manufacturer taking its credit again – HELD : Principal manufacturer was entitled to take the credit and there was no dual benefit to them.

Aries Dyechem Industries vs. Commissioner of Central Excise-2010 (257) E.L.T. 113 (T).

14. Section 35 of Central Excise Act – Commissioner (Appeals) has no power to condone delay beyond period of 30 days.

Appeal to Commissioner (Appeals) – Limitation – Power to condone delay beyond 30 days – Provisions of Section 5 of Limitation Act, 1963 in applicable to Section 35 of Central Excise Act, 1944

Amchong Tea Estate vs. Union of India- 2010 (257) E.L.T. 3 (S.C.).

15. Rule 26 of Central Excise Rules, 2002-Personal penalty on Managing Director, Director & Project-in-charge.

Personal penalty on Managing Director, Director and Project in-charge cannot be imposed for use of brand name of others by SSI. No evidence of knowledge or intention on part of said persons in relation to evasion by company.

Commissioner of Central Excise vs. Shyam Detergents- 2010 (256) E.L.T. 783 (Tri. Del.)