The Commissioner Of Central Excise vs M/S.Rogini Mills Ltd on 22 October, 2010

Bench: F.M.Ibrahim Kalifulla, N.Kirubakaran

In the High Court of Judicature at Madras

Dated : 22.10.2010

Coram :

THE HON'BLE MR.JUSTICE F.M.IBRAHIM KALIFULLA
and
THE HON'BLE MR.JUSTICE N.KIRUBAKARAN

Civil Miscellaneous Appeal No.2418 of 2010

The Commissioner of Central Excise
No.1, Foulkes Compound
Anaimedu, Salem 636001. .. Appellant

vs.

1. M/s.Rogini Mills Ltd.
(now known as Rogini Textile
Industry (P) Ltd.)
Indiampalayam, Arasur Post
Sathyamangalam 639 454.

2. The Customs, Excise and Service Tax
Appellate Tribunal
South Zonal Bench, Chennai. .. Respondents

Civil Miscellaneous Appeal filed under Section 35G of the Central Excise Act, against th

For Appellant : Mr.E.Vijay Anand, Panel Counsel for
Central Excise.

J U D G M E N T

(Judgment of the Court was delivered F.M.IBRAHIM KALIFULLA,J.) The Commissioner of Central Excise is the appellant. The questions of law, which the appellant seeks to raise, read as under:

> "1. Whether the expression "as such" appearing in Rule 3(4)(C) of the Cenvat Credit Rules, 2002 would cover used as well as unused capital goods or not?
>
> 2. Whether the assessee is required to reverse credit equivalent to credit taken when used capital goods are removed from the factory or not?"

2. The brief facts, which are required to be stated, are that the first respondent is the manufacturer of cotton yarn, which avails cenvat credit facilities. They sold their Cenvat availed capital goods on payment of duty by adopting the transaction value at the time of subsequent sale instead of the value for which the Cenvat credit was originally taken on the inputs or capital goods. A show cause notice dated 30.12.2004 was issued determining the differential duty. The lower adjudicating authority confirmed the differential duty of Rs.1,11,912/- with appropriate interest and also imposed penalty of equal amount.

3. Aggrieved by the same, the first respondent filed an appeal before the Commissioner of Central Excise (Appeals), Salem. The appeal was rejected by the Commissioner of Central Excise (Appeals) by his order dated 20.06.2005. The Commissioner of Appeals, however, deleted the penalty part of it. The first respondent preferred a further appeal before the Tribunal. The Tribunal, by the impugned order dated 05.02.2010, following earlier order of the Tribunal rendered in Cummins India Ltd. vs. Commissioner of Central Excise, Pune reported in 2007 (219) ELT 911, which was also upheld by the High Court of Bombay in the judgment reported in 2009 (234) ELT A120, which was subsequently followed by the Tribunal in Principal Bench, New Delhi in the order reported in 2009 (242) ELT 124, held that the claim of the first respondent that the paid duty on the used capital goods on the reduced value was justified. After so holding, the Tribunal set aside the orders of the lower authorities, remanded the matter back to the original authority, to re-determine the demand amount after allowing depreciation to the extent allowed in the decision reported in 2009 (242) ELT 124.

4. We heard Mr.E.Vijay Anand, learned Standing Counsel for the appellant. Learned counsel by drawing our attention to Lower Bench decision of the Tribunal reported in 2008 (232) ELT 29 in the case of Modernova Plastyles Pvt. Ltd. vs. Commissioner of Central Excise, Raigad, contended that the expression "as such" used in Rule 3(4)(C) of the Cenvat Credit Rules, 2004 would only mean the value to be taken at the time of its initial procurement and it cannot permit the availing of depreciated value even if the capital goods were substantially used and disposed of after such use.

5. Though the contention of the learned Standing Counsel appears to be very sound in the first blush, we are not in a position to accede to the said submission. Rule 3(4)(C) of the 2004 Rules reads as under:

> "When inputs or capital goods, on which Cenvat credit has been taken, are removed as such from the factory, the manufacturer of the final products, shall pay an amount

equal to the credit availed in respect of such inputs or capital goods and such removal shall be made under the cover of an invoice referred to in Rule 7.1."

6. In the first place, the provision for reversal of the Cenvat credit availed has been provided for under Rule 3(4)(C) of the 2004 Rules. When we peruse the order of the Principal Bench, New Delhi in its order reported in 2009 (242) ELT 124, we find a reference to the Board's Circular No.643/34/2002-C.X., dated 01.07.2002, a Board's letter bearing No.495/16/1993-Cus.VI, dated 26.05.1993 and also a provision, which was added to Rule 3(5) of Cenvat Credit Rules 2004 (corresponding to Rule 3(4) of Cenvat Credit Rules, 2002), which stipulated that the capital goods on which Cenvat credit had been taken or removed after being used, the Manufacturer should pay an amount equal to the Cenvat credit taken on the said capital goods reduced by 2.5% for each quarter of a year or part thereof from the date of taking the Cenvat credit. The Board's Circular dated 01.07.2002 stated that the capital goods on which Cenvat credit had been taken or cleared under Rule 3(4), the Manufacturer would be required to pay an amount equal to the duty at the rate prevailing on the date of clearance and on the value determined under the provisions of Section 4 of the Central Excise Act and the depreciation as per the rates fixed in the Board's Letter dated 26.05.1993 should be allowed.

7. On a conjoint reading of Rule 3(4) with the provision added to Rule 3(5) with effect from 13.11.2007, the Board's Circular dated 01.07.2002 along with Board's letter dated 26.05.1993, it is quite clear that the inputs or capital goods when disposed of after putting it into some use over a period of time, then the assessee would be entitled to reverse whatever Cenvat credit availed on the value to be assessed on the date of such subsequent sale as capital goods. Such a conclusion by relying upon the above referred to Board's Circular and the letter as well as the addition of proviso to Rule 3(5) with effect from 13.11.2007, is the manner in which the expression 'as such' used in Rule 3(4) can be interpreted. Consequently, the interpretation put in the order of the Principal Bench reported in 2009 (242) ELT 124 merits acceptance. The order of the Tribunal impugned in this appeal applying the said ratio of the Principal Bench is, therefore, perfectly justified.

8. As far as the order of the Larger Bench of the Tribunal reported in 2008 (232) ELT 29 is concerned, we find that though a reference has been made to the addition of the proviso to Rule 3(5) with effect from 13.11.2007, the relevancy of the said addition providing for making an assessment in a depreciated manner i.e. reducing the Cenvat credit at the rate of 2.5% for each quarter of a year from the date of taking Cenvat credit has not been examined. In the circumstances, the order of the Tribunal impugned in this appeal cannot be found fault with.

9. We, therefore, do not find any scope to entertain this appeal, inasmuch as the questions of law sought to be raised at the instance of the appellant have already been correctly answered by the Tribunal itself and therefore, we do not find any need or necessity to entertain the said questions of law once over again. The order of the Tribunal in remanding back to the original authority for re-determination of the amount after allowing depreciation to the extent allowed in the case law cited in its order is sustained. The appeal fails and the same is dismissed Consequently, M.P.No.1 of 2010 is also dismissed.

ATR To

1. The Commissioner of Central Excise No.1, Foulkes Compound Anaimedu, Salem 636001.

2. The Customs, Excise and Service Tax Appellate Tribunal South Zonal Bench, Chennai