Customs, Excise and Gold Tribunal - Mumbai
Kores India Ltd. vs Collector Of Central Excise on 23 May, 1990
Equivalent citations: 1990 (52) ELT 137 Tri Mumbai
ORDER R. Jayaraman, Member (T)

1. The Reference Application has been moved by M/s Kores (India) Ltd. (hereafter referred to as "the applicants") under Sec. 35G of the Central Excises and Salt Act, 1944, arising out of the order of this Bench No. 1808/88 WRB dt. 15-12-88.

2. The undisputed facts covered by the Reference Application are summed up below.

3. The applicants are manufacturers of items like duplicating paper, stencil papers classifiable under Chapter 48 and also manufacturers of other items like duplicating ink, typewriter ribbons etc. They were availing proforma credit under Rule 56A in respect of inputs such as tissue paper, Maplitho paper, printing paper etc. used in the manufacture of finished products like duplicating and carbon paper. The facility of proforma credit was available in respect of the aforesaid inputs used in the manufacture of other varieties of paper classifiable under Chapter 48 even before 1986 Budget. In the 1986 Budget, MODVAT scheme was introduced on 1-3-86. This scheme was not extended in the initial stages to the final product, namely-paper-classifiable under Chapter 48. All the same, the facility of Rule 56A in respect of the aforesaid inputs used in the manufacture of paper classifiable under Chapter 48 was not disturbed. The MODVAT scheme was however made available in respect of other inputs used in products like duplicating ink, typewriter ribbons etc. which are classifiable under other Chapters. Hence the applicants, while continuing availment of proforma credit benefit under Rule 56A in respect of different varieties of paper used in the manufacture of duplicating and carbon paper, also opted for MODVAT credit in respect of inputs used in the final product other than paper to which the MODVAT scheme has been extended from 1-3-86 onwards. This was objected to by the department on the ground that by virtue of sub rule (9) of Rule 56A which came to be inserted effective from 1-3-86, the applicants could not avail of the proforma credit and hence demanded the amount of the credit taken by way of proforma credit under Rule 56A.

4. The undisputed facts are that the inputs in respect of which proforma credit was taken are not the same ones which were covered by MODVAT scheme and it is also not disputed that the credit was available in respect of those inputs meant for use in the manufacture of paper even after 1-3-86. The point of dispute arose only because of subrule (9) of Rule 56A which was inserted effective from 1-3-86. The said sub-rule reads as below:

"Nothing contained in this Rule shall apply to a manufacturer availing of the credit of the duty paid on the inputs under Rule 57A."

The department's main objection was that since the applicants were availing of the MODVAT benefit under Rule 57A in respect of certain inputs used in the manufacture of final products other than paper, they cannot simultaneously avail of the proforma credit benefit under Rule 56A, because of the aforesaid sub-rule (9) of Rule 56A. In the adjudication proceedings initiated by the Assistant Collector, the Assistant Collector held that because the applicants were availing of MODVAT credit

under Rule 57A effective from 1-3-86 in respect of certain inputs and final products covered by MODVAT scheme, they cannot avail of the proforma credit under Rule 56A in respect of inputs used in the manufacture of paper. Accordingly the Assistant Collector, in his order No. V/SCN(30)96/5786/dated 23-12-87 confirmed the demands covered by the three show cause notices as per details below:

Show cause Notice	Amount
i) RV/MODVAT/86/1038 dt. 26-11-86	Rs. 22,12,608.58
ii) RV/MODVAT/86/1043 dt. 28-11-86	Rs. 7,47,278.98
iii) RV/MODVAT/86/249 dt. 5-3-87	Rs. 11,92,866.08

The applicants' went in appeal before the Collector (Appeals), who rejected the applican

(i) the bar contained in sub-rule (9) of Rule 56A was not applicable to the applicants because they were not availing of the MODVAT credit under Rule 57A in respect of the very same inputs for which they have taken the proforma credit. The inputs for which they had availed of the MODVAT benefit were totally different inputs used in totally different finished products and not in respect of paper, in respect of which proforma credit was availed of. Hence they were not availing of the proforma credit benefit under Rule 56A in respect of the very same inputs for which they have availed of MODVAT benefit.

(ii) Since the MODVAT scheme was sought to be introduced by stages, the benefit under Rule 56A was also continued in respect of those cases which were not covered by MODVAT scheme. Hence the obvious intention was to permit proforma credit facility in respect of those inputs and finished products, which are not covered by MODVAT scheme newly introduced in the 1986 Budget.

(iii) In view of the aforesaid position, the bar specified in sub-rule (9) of Rule 56A prior to amendment cannot be said to totally preclude a manufacturer from availing of proforma credit in respect of those inputs not covered by the MODVAT scheme.

(iv) In the 1987 Budget, Chapter 48 relating to paper was deleted from Rule 56A and the same was included in the MODVAT scheme.

(v) Sub rule (9) of Rule 56A was also subsequently amended to bring out the intention clearly as under:

"No credit of duty paid on any material, component parts or finished product shall be allowed under this rule, if credit of duty paid on such material, component parts or finished product has been taken

under Rule 57A."

Subsequent amendment of sub-rule (9) of Rule 56A clearly brings out that the applicable only in a case where the very same inputs covered by Rule 56A being led in respect of which proforma credit has been claimed are also sought to be ex-ed the benefit under the MODVAT scheme (Rule 57A). Hence even during the d prior to 15-4-87, when the sub-rule (9) of Rule 56A was amended, so long as they not availed of MODVAT credit in respect of the very same inputs for which proforredit has been taken, they are not to be denied the proforma credit under Rule 56A. subsequent amendment brought out on 15-4-87 was only clarificatory in nature.

(vi) Arguments were also advanced on ground of time bar in respect of certain demands.

5. On behalf of the department, it was argued as below:

(i) Sub-rule (9) of Rule 56A before amendment bars the manufacturer from availing of the proforma credit, if he avails of the credit of duty paid on inputs under Rule 57A. The bar is in respect of the manufacturer per se and no distinction is made on the basis of inputs.

(ii) Sub-rule (9) of Rule 56A over-rides the other provisions in Rule 56A. Even according to the intention of the Legislation, a manufacturer availing of the benefit under the MODVAT scheme cannot simultaneously be permitted to avail of the proforma credit under Rule 56A prior to 15-4-87.

(iii) The amendment brought out on 15-4-87 can only be prospective and this amendment has been made based on the various representations and as a result of change in the policy consideration.

(iv) For interpreting the statute, one should go by the strict wording of the provisions of the statute and cannot go beyond what is contained in the statute. If such a reading of sub-rule (9) of Rule 56A is made, as it stood then, it leaves no ambiguity. It makes clear that the bar is applicable to the manufacturer per se who avails of the credit of duty paid on inputs under Rule 57A (MODVAT scheme).

6. On consideration of the aforesaid arguments from both the sides, this Bench in its order No. 1808/88 WRB dt. 15-12-88 accepted the plea of the applicants on the question of time bar with regard to certain demands and partly allowed the appeal. However, on the main issue as to the question of availing of simultaneous benefit of MODVAT scheme as well as the proforma credit benefit by the applicants, their appeal was rejected. The reasoning given by this Bench is as below:

The reading of sub-rule (9) of Rule 56A, as it stood prior to 15-4-87, indicates that two categories of manufacturers are envisaged, one coming under the purview of Rule 56A and another opting for MODVAT credit. The said sub-rule (9) puts a total bar on a manufacturer availing of the benefit under Rule 56A, if the said manufacturer avails of MODVAT credit under Rule 57A. This Bench did not accept the interpretation urged on behalf of the applicants that the bar is to be made applicable, only if proforma credit has been availed of in respect of the very same inputs for which the manufacturer has opted for MODVAT scheme. This Bench was of the view that as sub-rule (9) was

worded then, a plain and simple reading clearly indicated that if a manufacturer avails of the credit of duty paid on inputs under Rule 57A, proforma credit under Rule 56A shall not apply. This Bench took the view that the bar is applicable to a manufacturer perse, if that manufacturer avails of the credit of duty paid on inputs under Rule 57A. It is against this decision, the applicants have now moved the Reference Application for rerferring certain points of law, before the Hon'ble High Court.

7. The questions of law suggested for reference are as under:

(a) Whether on a true and proper interpretation of Rule 56A(9), the benefit of the rule can be denied to specified goods merely because the manufacturer is availing MODVAT benefit for other goods?

(b) Whether Rule 56A(9) can be interpreted in such a manner that the words "of duty paid on inputs" used in the said rule becomes redundant?

(c) Whether the clarificatory amendment to Rule 56A(9) by Notification No 117/87 dated 15-4-87 is retro-active in operation?

8. Shri C.S. Lodha, the learned advocate, while arguing on the Reference Application on behalf of the applicants, contended as below.

9. As per sub-rule (8) of Rule 56A, it is provided that if proforma credit was available in respect of raw materials or component parts under Rule 56A, before the commencement of the Central Excise Tariff Act, 1985, such credit shall continue to be allowed notwithstanding any change made either in the nomenclature or classification of the goods or in Rule 56A. Hence notwithstanding the change brought out under sub-Rule (9) of Rule 56A, so long as the inputs were eligible for proforma credit under Rule 56A before commencement of the Central Excise Tariff Act, 1985, such credit shall continue to be allowed. His next argument was that it is not the case of the department that the applicants were availing of simultaneous benefit under both the MODVAT scheme as well as under the proforma credit scheme in respect of the very same inputs used in the manufacture of the same final products. The undisputed fact is that the inputs and final products in respect of which MODVAT benefit was availed of are totally different from the ones for which proforma credit was taken. Since the applicants did not avail of the credit of duty paid on the same inputs under Rule 57A, they can continue to avail of the benefit in respect of those inputs under Rule 56A in the same manner in which the applicants were availing of benefit in respect of those inputs prior to 1-3-86. Elaborating on this point further, he contended that the term referred to in sub-rule (9) of Rule 56A, as it stood prior to amendment, referred to the inputs under Rule 57A. Hence the bar is applicable only if the manufacturer avails of the credit of duty paid on inputs under Rule 57A (emphasis supplied). So long as the manufacturer does not avail of the duty paid on inputs under Rule 57A, the bar is not applicable. He, therefore, contended that the wording "inputs under Rule 57A" have considerable significance. The bar cannot be applied to a manufacturer as a class. Even going by the intention, the Government cannot give double benefit in respect of the same inputs used in the same final products nor can the Government permit a manufacturer to avail of both the benefits, if they are covered under both the schemes, where the manufacturer has to choose either one of the two schemes. In this case, benefit under Rule 56A was available in respect of paper even prior to 1-3-86

and was continued thereafter as well. With effect from 1-3-86 MODVAT scheme covering more inputs and more final products was also introduced but paper was not included in the MODVAT scheme. Hence the applicants, who are manufacturers of items of paper classifiable under Chapter 48, which is covered by proforma credit scheme continued to avail of proforma credit for paper, while they opted for MODVAT scheme in respect of other items in respect of which proforma credit was not available earlier nor was given aiter 1-3-86. His main emphasis was that the inputs under Rule 56A in respect of credit was taken were not the inputs under Rule 57A and the bar is applicable only in respect of a manufacturer availing of the credit of duty paid on "inputs under Rule 57A (emphasis supplied). His next argument was that even the inappropriate phraseology of Rule 56A was subsequently amended and hence the same is in the nature of clarification. With this amendment, no doubt was left that the benefit of Rule 56A could be denied only if, in respect of the very same goods in question, credit was availed of under Rule 57A. It was contended by him that the above amendment was necessitated as a result of erroneous interpretation taken by the excise authorities and in order to put the master beyond any doubt, amendment was carried out. Hence the amendment is more in the nature of clarification of already existing position and hence it can be construed as retroactive.

10. Shri K.M. Mondal, the learned SDR on behalf of the Department, on the other hand, contended that sub-rule (9) of Rule 56A, as it was worded prior to amendment, leaves no ambiguity. It draws the dividing line as between the manufacturer availing of MODVAT credit vis-a- vis those availing proforma credit. A manufacturer availing of MODVAT credit under Rule 57A cannot avail the benefit under Rule 56A, even though the inputs may be different. The wording of the sub-rule (9) of Rule 56A clearly states that nothing contained in this rule shall apply to a manufacturer availing of the credit of duty paid on inputs under Rule 57A. The term "inputs" has not been given a specific definition. The term refers to those goods which are used in or in relation to the manufacture of final products. He, therefore, urged that since the wording of sub-rule (9) of Rule 56A is quite clear and leaves no scope for any other interpretation, there is no point of law involved calling for reference to the Hon'ble High Court. He also contended that the amendment carried out on 15-4-87 after nearly one year cannot be called clarificatory in nature. It is also not disputed that Chapter 48 relating to paper was included in MODVAT scheme only in 1987 Budget and only then the amendment of subrule (9) of Rule 56A was carried out. This amendment was more in the nature of change in the policy decision rather than one of clarification of the already existing sub-rule (9) of Rule 56A. He, therefore, contended that the subsequent amendment carried out under Notification No 117/87 dated 15-4-87 cannot be construed as retroactive in operation. The benefit of this amendment can be applied only prospectively.

11. After hearing both sides, we observe that the issue raised by the learned advocate Shri C.S. Lodha for the applicants, is purely a question of law. The interpretation which he seeks to place on sub-rule (9) of Rule 56A, as it stood then, cannot also be dismissed as of no significance. The main question in the Reference Application to be decided is, whether the bar envisaged in sub-rule (9) of Rule 56A is applicable to the manufacturer per se if he avails of the benefit under the MODVAT scheme or whether the bar is applicable only if that manufacturer avails of MODVAT scheme in respect of the same inputs, for which proforma credit benefit is also availed of by the manufacturer. The issue, no doubt, bristles with debate and we consider it necessary to refer this point of law to the Hon'ble

High Court so as to put the matter beyond any pale of doubt. While the view taken by this Bench that the bar is applicable to a manufacturer who cannot avail of proforma credit, if he opts for MODVAT scheme, appears to flow from a simple and straight reading of sub-rule (9) of Rule 56A, the other view canvassed by the applicants cannot also be brushed aside, mainly because of the fact that the term used in sub-rule (9) of Rule 56A refers to the availment of credit of duty paid on inputs under Rule 57A. Hence it can be argued that so long as the manufacturer does not avail of the credit of duty paid on the same inputs under Rule 57A, he cannot be precluded from availing of benefit in respect of some other inputs under Rule 56A. In view of the possibility for a different interpretation on this question of law, we would deem it proper to refer the following questions of law for determination by the Hon'ble High Court :-

(i) Whether on a true and proper interpretation of sub-rule (9) of Rule 56A of the Central Excise Rules, as it stood prior to amendment dated 15-4-87, the benefit of proforma credit under Rule 56A can be denied to the applicants merely because the manufacturer has availed of MODVAT benefit for totally different materials, which are covered by the MODVAT scheme under Rule 57A of the Central Excise Rules?

(ii) Whether Rule 56A can be interpreted in such a manner that the manufacturer does not avail of the MODVAT benefit in respect of the same inputs covered by Rule 57A especially when the said sub-rule (9) of Rule 56A talks of availment of credit of duty paid on inputs under Rule 57A.

(iii) Whether the amendment to sub-rule (9) of Rule 56A by Notification No. 117/87 dated 15-4-87 can be construed to be a clarificatory nature and is retroactive in operation.