Customs, Excise and Gold Tribunal - Tamil Nadu
Sree Jaya Steels vs Collector Of Central Excise on 3 April, 1990
Equivalent citations: 1991 ECR 115 Tri Chennai, 1991 (56) ELT 413 Tri Chennai
ORDER V.P. Gulati, Member (T)

1. This is an appeal against the order of the Collector of Central Excise, Madurai dated 21-1-1989. The brief facts of the case are that the appellants imported a vessel for scrapping and cleared the same on payment of basic customs duty at the rate of Rs. 1035/- per LOT as well as countervailing duty on the same at the rate of Rs. 365/- per LDT. The appellants started clearing the scrap generated by breaking the ship without payment of Central Excise duty and without taking out a licence in regard to the production of the same. Some loads of scrap being carried by the vehicles totally weighing 29.165 M.T. were intercepted and the scrap was also seized. On a check conducted by the authorities it was found that the appellant had removed 582.629 M.T. of ship breaking scrap during the period 26-4-1988 to 29-5-1988. The authorities were of the view that as per Notification No. 102/87 and 93/88 duty was required to be paid at the rate of Rs. 365/- per M.T. as also special Excise duty at the rate of 5% on BED. The appellants were issued a show cause notice and duty to the tune of Rs. 3,94,345.46 was demanded from them. The appellants in their reply pleaded that they had filed an application for issue of licence on 22-3-1988 with the concerned Range Officer and the licence was issued to them on 5-5-1988 and also they had filed a classification on 16-5-1988 and the same was approved on 13-6-1988 effective from 1-3-1988. They also pleaded that they had filed a declaration under Rule 57A for availing of the MODVAT credit on 23-5-1988 and the same was acknowledged on 30-6-1988 and they had sought permission to avail of the MODVAT credit for the quantity already cleared from 8-3-1988 to 23-5-1988 under Rule 57H(2). They also pleaded that they were under the mistaken impression that the duty paid at the stage of import was sufficient for ship breaking. The learned lower authority, however, while accepting the bona fides of the appellants denied them the benefit of the MODVAT credit as claimed by them under Rule 57H(2). The lower authorities' findings in this regard are as under :-

"14. Here in this case, the vessel M.V. TONIA' was imported in January, 1988 and ship breaking operations commenced in March 1988. The party took out a Central Excise licence only on 5-5-1988 and declaration under Rule 57A was made on 23-5-1988. So, it is difficult for me to hold that in terms of transitional provisions of Rule 57H(i) and (ii) benefit can be given in respect of clearances of scrap materials made prior to the date of filing of declaration under Rule 57G. However, I am convinced from the facts and circumstances of the case that the violations cited against the party are not intentional in nature. But due to the restrictive nature of the provisions of Rule 57H, I feel that credit can be given only in respect of the clearances made only after filing the declaration for availing Modvat credit, that is, from 24-5-1988 ...." After taking into consideration the facts and circumstances of the case, the appellants were called upon to pay the duty of Rs. 3,10,245.09 in respect of the scrap cleared by them from 23-3-1988 to 23-5-1988. The scrap which was seized was also allowed to be redeemed on payment of a fine of Rs. 29,000/-. The learned lower authority in the facts and circumstances of the case desisted from levying any penalty.

2. The learned Advocate for the appellants pleaded that the appellants had imported the ship for scrapping after paying the basic customs duty as also the additional duty of customs equivalent to

Central Excise duty leviable on the scrap and the appellant had duly applied for the licence for breaking the ship and manufacture of the scrap therefrom, and the licence was granted to them on 5-5-1988. He pleaded that no doubt the appellants had filed the necessary declaration as required under Rule 57G for availing of the MODVAT credit on 23-5-1988, the appellants had at the same time applied for availing of the MODVAT credit in terms of Rule 57H on 28-6-1988. He pleaded that the learned lower authority has not given any findings as to why the appellants were not entitled to the benefit of MODVAT credit in terms of Rule 57H. The learned Advocate pleaded that no duty was required to be paid in case the appellants are allowed MODVAT credit and there will not be any short levy in the present case.

3. The learned SDR for the Department pleaded that Rule 57H envisages that the goods should have been lying in stock before filing of the declaration under Rule 57G which was not the case in the present case before us. The learned SDR pleaded that though the ship is a specified input and the scrap is an end-product specified under Rule 57A after the ship had been broken and the scrap removed, the same cannot be said to be lying in stock for the purpose of availing of the MODVAT credit under Rule 57H. He further pleaded that Rule 57H(1) (i) & (ii) were deleted but conceded that the same were still in force during the relevant period before us. He further pleaded that in view of the wording of the Rule 57H the inputs received after March, 1987 will not be eligible for the benefit of this Rule inasmuch as this Rule was in the nature of a transitional provision introduced for the temporary purpose of granting relief in cases where the appellants might not have filed the declaration out of ignorance at the time when the MODVAT provision became applicable in respect of the specified inputs and end-products as notified under Rule 57A. He pleaded that in the appellants' case the inputs were taken in for production somewhere in 1988 and the clearance & finished end-product was also made after March, 1988 onwards and the question of applying the transitional provisions under Rule 57H would not arise. To a specific query from the Bench if that was the case why the transitional provision was kept on the statute book much after 1987, he had no particular reply to give.

4. The learned Advocate at this stage also pleaded that in respect of the seized goods the duty amount involved was only Rs. 9,000/- and a high redemption fine of Rs. 29,0007- has been fixed. He requested for leniency in this regard.

5. We observe that it is not disputed that the ship brought in for breaking into scrap is a specified input for the purpose of taking MOD VAT credit for the manufacture of scrap therefrom and that after the declaration under Rule 57G had been filed the appellants have been given the benefit of the MOD VAT credit. The issue before us, therefore, is about the availability of MOD VAT credit in respect of the clearances of the scrap made during the period 23-3-1988 to 23-5-1988 before filing of the declaration under Rule 57G. It is observed that the appellants had made a specific plea that the provisions of Rule 57H are available to them for availing of the MOD VAT credit. But the learned lower authority has merely stated that due to the restrictive nature of the provisions of Rule 57H, the credit can be given only in respect of the clearances made after filing the declaration for availing of the MOD VAT credit. The learned lower authority has not given any reasons as to how on a reading of the Rule 57H the appellants are not eligible for the same nor has he given any interpretation as to the scope of the Rule 57H. It is observed that Rule 57H at the relevant time provided for allowing of

the credit by the Assistant Collector in respect of the inputs received by a manufacturer immediately before his obtaining the dated acknowledgement of the declaration made under Rule 57G if he was satisfied that such inputs are lying in stock or are received in the factory after filing the declaration under Rule 57G or such inputs are used in the manufacture of the final product which are cleared from the factory on or after the 1st day of March, 1987. It is seen that according to sub-rule (ii) of Rule 57H(1) the credit could be taken in respect of the inputs which might have been received and lying in stock after filing of the declaration but before the acknowledgement could be obtained by the manufacturer. The second part of the Rule 57H i.e. sub-rule (ii) of Rule 57H(1) allowed credit in cases where before obtaining the dated acknowledgement the inputs have been used in the manufacture of the final products which are cleared from the factory on or after the 1st day of March, 1987. In the present case we find that the appellants had started breaking the ship before they filed the declaration under Rule 57G and part of the ship had already been broken and scrap obtained therefrom cleared by them and it cannot, therefore, be said that part of the ship out of which the scrap was generated was lying in stock or was lying before the dated acknowledgement was obtained by them. The sub-rule, therefore, applicable to the applicants' case is 57H(1)(ii) which reads as under :-

"(ii) such inputs are used in the manufacture of final products which are cleared from the factory on or after the first day of March, 1987...."

6. The position is, therefore, required to be examined in terms of Rule 57H(1)(ii). It is observed that under Rule 57H(1), the Assistant Collector may allow credit of duty paid on inputs received by a manufacturer immediately before obtaining the dated acknowledgement of the declaration made under the said Rule if he is satisfied that provisions of either sub-rule (i) or (ii) are complied with and subject to the other provisions set out in the Rule. The point, therefore, that has to be considered is whether the ship received by the appellants can be taken to have been received immediately before obtaining the dated acknowledgement and whether the same has been used in the manufacture of the final product namely, the scrap after 1st March, 1987. The term 'immediately before' has been set out in Venkataramaiya's 'Law Lexicon & Legal Maxims' as under :-

"Preceding the date" and "immediately before" are interchangeable terms conveying the same idea. "Preceding the date" was held by the Supreme Court to mean prior to commencement of the liquidation. The same meaning will hold good for "immediately before".

"Profits earned and accumulated upto the date of liquidation are thus covered by sub-clause (c). Kanhaiya Lal Bhargava v. Official Liquidator, (1965) 35 Com. Cas. 340 at pp. 344-45."

7. In T.P. Mukherjee's "Law Lexicon Vol. I (1982 Edition)" under the heading "Immediately before dissolution" in the context of Section 187 of the Income-tax Act, 1961 has been shown to mean "preceding the date of dissolution."

8. Inasmuch as Rule 57H, which has been titled as "Transitional provisions", has been kept on the statute book much after 1987 when it was introduced after amendment it has to be held that the benefit of this Rule was intended to be given to the manufacturers even after March, 1987 and the

wording "immediately before" in this context has to be read as "preceding the date" as set out in the Law Lexicon. In the light of this when we examine the facts of the present case, it has to be held that the appellants had the input with them i.e. the ship preceding the date of the dated acknowledgement and that the same was used in the manufacture of the finished product cleared from the appellants' factory on or after the 1st day of March, 1987. The appellants' case, therefore, has to be held to be falling within the purview of Rule 57H and in that view of the matter, the appellants' plea therefore has to be allowed and the benefit of the MOD-VAT credit in respect of the duty paid by them on the input has to be allowed. The appeal is, therefore, allowed in the above terms.