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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO.27 OF 2004

Commissioner of Central Excise]
Raigad Commissionerate]
4th floor, Central Excise Building]
Plot No.1, Sector No.17]
Khandeshwar, New Panvel-410206.] ..Appellant

-Versus-

1) M/s. Modernova Plastyles Pvt. Ltd.]
Plot No.19-20 & 25-26]
Alibag Industrial Co-op.Estate]
Village Kurul, Dist-Ragiad.]

2) M/s. MIRC Electronics Ltd.]
Village Kudus]
Bhiwandi Wada Road]
Taluka Wada, Dist-Thane.] ..Respondents

.....

Mr. A. S. Rao a/w Mr. Jitendra B. Mishra for the Appellant.
Mr. M. H. Patil i/b. M/s. Cen-ex Services for the Respondents.

.....

CORAM: S.C. DHARMADHIKARI
AND
SUNIL P. DESHMUKH, JJ.

DATE :- 16th FEBRUARY, 2015.

ORAL JUDGMENT (PER SUNIL P. DESHMUKH,J)

We have perused the following substantial questions of law as framed by this Court in its order dated 18th August, 2005:-

"(1) Whether the Respondent/Assessee is entitled to claim Modvat/CENVAT when Capital goods is not owned/purchased nor taken on lease or hire purchase agreement?

(2) Whether the view taken by the Tribunal is correct in law in view of the decision reported in 2001 (138) ELT 889 Trb. Mumbai?"

2] The factual position is that the Assessee-Respondent is engaged in manufacture of plastic articles/components and parts by using injection moulding machines. In the present matter the moulds, used to manufacture, in this case cabinets for television sets- the finished product, were supplied to the Assessee by the Original Equipment Manufacturers. The dispute relates to the years 1997-98, 1998-99.

3] A show cause notice came to be issued on 27th October, 1999 alleging that the assessee has availed and utilized inadmissible Modvat Credit on the moulds as capital goods to the tune of Rs.35,49,659/- in contravention of Rules 57Q, 57R(3) and 57(T) of Central Excise Rule, 1944. The show cause notice has been issued for the reason that the Assessee is neither owner of the capital goods nor has it hired the same on lease, hire-purchase or loan agreement from the financer.

4] The show cause notice was replied by the Respondents, pointing out that as alleged in the show cause notice, it was not necessary that the moulds should be owned by the assessee since Rule 57Q and 57R underwent amendments after 1994.

5] The provisions as were subsisting before the amendment read as under:-

> *"**RULE 57Q**. Applicability. – (1) The provisions of this section shall apply to finished excisable goods of the description specified in the Annexure below (hereinafter referred to as the "final products") for the purpose of allowing credit of specified duty paid on the capital goods used by the manufacturer in his factory and for utilising the credit so allowed towards payment of duty of excise leviable on the final products, or as the case may be, on such capital goods, if such capital goods have been permitted to be cleared under rule 57S, subject to the provisions of this section and the conditions and restrictions as the Central Government may specify in this behalf:*
>
> *Provided that credit of specified duty in respect of any capital goods produced or manufactured -*
>
> *(a) in a free trade zone and used for the manufacture of final products in any other place in India; or*
>
> *(b) by a hundred per cent export-oriented undertaking or by a unit in an Electronic Hardware Technology Park and used for the manufacture of final products in any place in India,*
>
> *shall be restricted to the extent of duty which is equal to the additional duty leviable on like goods under section 3 of the Customs Tariff Act, 1975 (51 of 1975) equivalent to the duty of excise paid on such capital goods.*
>
> *Explanation – For the purpose of this section, -*
>
> *(1) "capital goods" means -*
>
> *(a) machines, machinery, plant, equipment, apparatus, tools or appliances used to producing or processing or any goods or for bringing about any change in any substance for the manufacture of final products;*
>
> *(b) components, spare parts and accessories of the aforesaid machines, machinery, plant, equipment, apparatus, tools or appliances used for aforesaid purpose; and*
>
> *(c) moulds and dies, generating sets and weigh-bridges used in the factory of the manufacturer.*
>
> *(2) "specified duty" means duty of excise or the additional duty under section 3 of the Customs Tariff Act, 1975 (51 of 1975).*

(2) Notwithstanding anything contained in sub-rule (1), no credit of the specified duty paid on capital goods shall be allowed if such duty has been paid on such capital goods before the 1st day of March, 1994.

RULE 57R. Credit of duty not to be allowed or denied or varied in certain circumstances and adjustment in duty credit. *– (1) Credit of the specified duty paid on the capital goods (other than those cleared either to a unit in free trade zone or to a hundred per cent export-oriented undertaking or to a unit in an Electronic Hardware Technology Park) shall not be allowed if such capital goods are used exclusively for production of a final product which is exempt from the whole of the duty of excise leviable thereon (other than a final product which is exempt from the whole of the duty of excise leviable thereon under any notification where exemption is granted based upon the value or quantity of clearances made in a financial year) or is chargeable to nil rate of duty :*

Provided that the credit shall also not be allowed in respect of the components, spare parts and accessories of such capital goods which are used for the aforesaid purposes.

(2) Credit of the specified duty allowed in respect of any capital goods shall not be denied or varied on the ground that any intermediate products have come into existence during the course of manufacture of the final product and that such intermediate products are for the time being exempt from the whole of the duty of excise leviable thereon or chargeable to nil are of duty :

(3) No credit of the specified duty paid on the capital goods shall be allowed if such capital goods are acquired by a manufacturer on lease, hire-purchase, loan or by any other transaction other than direct purchase, whereby the property in the said capital goods is not transferred to such manufacturer.

(4) If specified duty paid on any capital goods, in respect of which credit has been allowed under rule 57Q is varied subsequently due to any reason resulting in payment of refund to, or recovery of more duty from the manufacturer or importer, as the case may be, of such capital goods, the credit allowed shall be varied accordingly by adjustment in the credit account maintained under sub-rule (5) of rule 57 T or in the accounts maintained under rule 9 or sub-rule (1) of rule 173G, or if such adjustment is not possible for any reason, by cash recovery from or, as the case may be, refund to the manufacturer availing of the credit under rule 57Q.

(5) No credit of the specified duty paid on the capital goods shall be allowed, if such manufacturer claims depreciation under section 32 of the Income Tax Act, 1961 (43 of 1961) on that part of value of capital goods which represents the amount of specified duty paid on such capital goods."

6] The provisions of Rule 57R after the amendment read as under:-

"***RULE 57R****. Credit of duty not to be allowed or denied or varied in certain*

circumstances and adjustment in duty credit. – (1) No credit of the specified duty shall be allowed on (capital goods which are used exclusively in the manufacture of final products) (other than final products which are exempt from the whole of the duty of excise leviable thereon under any notification where exemption is granted based upon the value or quantity of clearances made in a financial year) (which are exempt from the whole of the duty of excise leviable thereon are chargeable to nil rate of duty) except when the final product is either,

(i) cleared to a unit in a Free Trade Zone, or

(ii) cleared to a hundred per cent export-oriented undertaking; or

(iii) cleared to a unit in an Electronic Hardware Technology Park or Software Technology Parks;

(2) Credit of the specified duty allowed in respect of any capital goods shall not be denied or varied on the ground that any intermediate products have come into existence during the course of manufacture of the final product and that such intermediate products are, for the time being, exempt from the whole of the duty of excise leviable thereon or chargeable to nil rate of duty :

Provided that such intermediate products are specified as final products in column (3) of the Table below sub-rule (1) of rule 57Q.

(3) The credit of the specified duty paid on the capital goods shall be allowed to a manufacturer if the capital goods are acquired by the manufacturer on lease, hire-purchase or loan agreement, from a financing company subject to the following procedure, namely :-

(i) The manufacturer shall file a declaration before the Assistant Commissioner of Central Excise as required under rule 57T;

(ii) The manufacturer availing credit of the specified duty paid on capital goods, who has entered into a financial arrangement, -

(a) for financing the cost of such capital goods excluding the specified duty, shall produce a copy of the invoice referred to in rule 57T, evidencing payment of specified duty along with a copy of the agreement entered into by him with the said financing company; or

(b) for financing the cost of such capital goods including the specified duty, shall produce a certificate from the financing company to the effect that the duty specified on such capital goods has been paid by the said manufacturer to such financing company, prior to payment of first lease rental installment or first hire-purchase installment or first installment of re-payment of loan, as the case may be, along with a copy of the agreement entered into with the said financing company;

(iii) The manufacturer and the financing company shall not claim depreciation under the Income-tax laws on that part of the value of capital goods which represents the amount of specified duty paid on such capital goods.

(iv) The relevant documents required for the purpose of availing credit of the specified duty paid on such capital goods under rule 57T shall bear the name of the manufacturer along with that of the financing company.

(4) If a manufacturer of final products has taken credit on any capital

goods and subsequently it so happens that any refund of the duty paid by the manufacturer of capital goods or importer of capital goods, as the case may be, is allowed to him for any reason, then the user manufacturer shall accordingly adjust th amount of credit in his credit account and if such adjustment is not possible for any reason, the user manufacturer shall pay the amount in cash equal to the amount of refund allowed to be manufacturer or as the case may be, to importer of capital goods.

(5) If a user manufacturer has taken credit on any capital goods and subsequently it so happens that any additional amount of duty is recovered from the manufacturer of such capital goods or importer of such capital goods, as the case may be, then the user manufacturer shall be allowed an additional credit equal to the amount of such additional amount recovered.

(6) The provisions of sub-rule (5) shall not apply in cases where the duty on capital goods has been short leveled or short paid or has been erroneously refunded by reason of fraud, collusion or any willful mis-statement or suppression of facts or contravention of any provisions of the Act or the rules made thereunder with the intent to evade payment of duty.

(7) (i) The additional credit as per sub-rule (5) shall be allowed by the proper officer on the basis of a certificate issued by the Superintendent of Central Excise having jurisdiction over the factory, or as the case may be, by the proper officer in the customs area, from where such capital goods were originally cleared.

(ii) the said certificate shall indicate full description of the capital goods, original duty paid and particulars of the documents under which the capital goods were cleared from the factory or, as the case may be, from the customs area and also the differential duty recovered from the manufacturer or the importer.

(8) No credit of the specified duty paid on the capital goods shall be allowed, if the manufacturer, claims depreciation under section 32 of the Income-tax Act, 1961(43 of 1961), or as revenue expenditure under any other provisions of the said Income-tax Act, in respect of that part of the value of capital goods which represents the amount of specified duty on such capital goods."

7] The authority of the first instance-the Commissioner passed an order in favour of the Revenue confirming the demand in the show cause notice with penalty and interest. Aggrieved by said order, the Respondent-Assessee was in Appeal before the Customs, Excise and Service Tax Appellate Tribunal(CESTAT). The CESTAT by order dated 1st December,

2003 allowed the Appeal filed by the Respondent-Assessee taking into account various decisions of the Hon'ble Supreme Court as well as this Court holding that the question which has been posed is no longer res integra, and also with reference to the decision in the case of ***German Remedies Ltd. V/s. Commissioner of Central Excise, Goa reported in 2002 (144) E.L.T. 606***.

8] Mr. Rao, learned counsel, appearing for the Appellant purports to rely upon the decision in the case of ***Terene Fibres India Pvt. Ltd. V/s. Commissioner of Central Excise, Mumbai-VI reported in 2001 (138) E.L.t. 889*** which according to him holds that it is essential that capital goods either be owned by the assessee or ought to be acquired by them on finance from the financing agencies.

9] Relying on the case referred to by the Tribunal in German Remedies (supra), counsel for the Respondent submits that Rule 57R(3) does not give rise to assumption as urged by the Appellant that the credit can be availed only if the capital goods are acquired by manufacturer on lease or hire-purchase or loan agreement from a financing agency. He further submits that the credit cannot be disallowed if other provisions of the relevant rules allow the same. He refers to the

reported judgment in the case of ***Union of India V/s. Marmagoa Steel Ltd. reported in 2008 (229) E.L.T. 481 (S.C.).*** He submits that once it is shown that the duty is paid by the supplier, then, credit is not to be denied to the assessee who manufactures the goods from the moulds supplied by the supplier/Original Equipment Manufacturer. In the case referred to above, the goods were transferred directly by importer to unit of Assessee from the Port and never went to manufacturing unit of importer. However, relevant duty paid documents were produced indicating that importer had borne the duty at the time of import and in such a case credit could not be disallowed to the assessee/manufacturer. He submits that facts in said case are identical to the facts in present matter. He refers to various other decisions particularly the order of this Court in Misc. Civil Application No.606/2002 dated 15th July, 2009 as well as dated 31st August, 2010 in Central Excise Appeal No.2 of 2006 in the case of ***The Commissioner of Central Excise V/s. M/s. Nylocraft Precision Plastics Pvt. Ltd. and Others.*** He further relies on the judgments rendered by two other High Courts, namely, Gujarat and Punjab & Haryana reported in ***2010 (262) E.L.T. 110 (Gujarat) and 2009 (236) E.L.T. 660 (P & H)*** respectively.

10] ***S***ub-rule (3) of Rule 57R which read before amendment as :

"(3) No credit of th specified duty paid on the capital goods shall be allowed if such capital goods are acquired by a manufacturer on lease, hire-purchase, loan or by any other transaction other than direct purchase, whereby the property in the said capital goods is not transferred to such manufacturer.

9] After amendment in 1994, the sub-rule (3) of Rule 57R read thus:-

"*(3) The credit of the specified duty paid on the capital goods shall be allowed to a manufacturer if the capital goods are acquired by the manufacturer on lease, hire-purchase or loan agreement, from a financing company subject to the following procedure, namely :-*
(i) The manufacturer shall file a declaration before the Assistant Commissioner of Central Excise as required under rule 57T;
(ii) The manufacturer availing credit of the specified duty paid on capital goods, who has entered into a financial arrangement, -
(a) for financing the cost of such capital goods excluding the specified duty, shall produce a copy of the invoice referred to in rule 57T, evidencing payment of specified duty along with a copy of the agreement entered into by him with the said financing company; or
(b) for financing the cost of such capital goods including the specified duty, shall produce a certificate from the financing company to the effect that the duty specified on such capital goods has been paid by the said manufacturer to such financing company, prior to payment of first lease rental installment or first hire-purchase installment or first installment of re-payment of loan, as the case may be, along with a copy of the agreement entered into with the said financing company;
(iii) The manufacturer and the financing company shall not claim depreciation under the Income-tax laws on that part of the value of capital goods which represents the amount of specified duty paid on such capital goods.
(iv) The relevant documents required for the purpose of availing credit of the specified duty paid on such capital goods under rule 57T shall bear the name of the manufacturer along with that of the financing company."

11] In the present case undisputedly the respondent-assessee is engaged in manufacturer of plastic articles /components and parts by using injection moulding machines and manufactures finished goods as per the requirement of the original equipment manufacturers. It is not in dispute that the moulds supplied by the supplier are capital goods. The

moulds used for injection moulding machine to manufacture the goods/finished products were supplied to the respondent assessee by original equipment manufacturer. These were duty paid moulds by the original manufacturer. Credit of the duties on moulds was being taken by the assessee. It is also not in dispute that the moulds supplied by the supplier are capital goods.

12] Though reliance is being placed by the appellant in the case of *Terene Fibres India Pvt. Ltd. vs. Commissioner of Central Excise, Mumbai VI.* In said case ultimate decision after difference of opinion between the members in the Division Bench of the Tribunal has been rendered in favour of the assessee holding that the demand is unsustainable. From the Judgment as has been rendered it is difficult to consider that there is a clear decision by the Tribunal that modvat credit would not be available to the respondent-assessee if the property in capital goods continued to vest in the supplier.

13] However, various citations relied on behalf of the respondents by Mr. M.H. Patil, learned counsel for the assessee, are pointer to the prevailing position in the matter. The assumption that, in case the property in capital goods continued to be in original equipment

manufacturers, credit cannot be taken by the vendor manufacturer-assessee would not be proper. There is considerable force in the submissions of Mr. Patil that it is not necessary that capital goods shall be owned or be acquired by the vendor/manufacturer-assessee and that assessee cannot be denied credit on the said ground.

14] In the present case there is no dispute that duty paid on capital goods-moulds, were supplied by the original manufacturer to the assessee. Perusal of rules before and after amendment the requirement of ownership was in the erst while regime upto 1994 as governed by then subsisting rules. After 1994, sub rule 3 of Rule 57R having under gone amendment to it, removed such requirement of ownership/acquisition from financing agency. For taking credit of duty paid on said goods, it would not be necessary that capital goods shall either be owned by the assessee or those shall be acquired by finance from financing agency. Denial of credit based on such ground is unsustainable.

15] We therefore consider that having regard to the prevailing legal position applicable to the case of the respondent assessee, Modvat/Cenvat credit cannot be disallowed to the assessee and it would be entitled to the same. We also consider that the decision of the Tribunal in the case of

Terene Fibres India Pvt. Ltd. vs. Commissioner of Central Excise Mumbai VI would be of no assistance to the appellant Revenue to carry forward its case, for, it cannot be said that in the said case there has been conclusive decision as is being assumed by the appellant revenue. Further having regard to the various decisions relied on behalf of the respondent assessee the decision relied on behalf of the appellant revenue is of little efficacy from position emerging from decision rendered by the Supreme Court in *Marmagoa Steel Ltd.* (supra) and other orders passed by this Court as well as decisions of Gujrat and Punjab & Haryana High Courts.

16] In view of the aforesaid discussion, both the questions stand answered in the affirmative, against the appellant. Appeal as such, stands dismissed. No order as to costs.

(SUNIL. P. DESHMUKH, J.) **(S.C. DHARMADHIKARI, J.)**

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