A MEWAR POLYTEX LTD.

v.

UNION OF INDIA AND ORS.

(Civil Appeal No. 10413 of 2010)

DECEMBER 9, 2010

B

[DR. MUKUNDAKAM SHARMA AND ANIL R. DAVE, JJ.]

Central Excise Rules, 1944: r.57A – Modvat credit on C *inputs –Advance Licencing Scheme – Declaration made by assessee on AR-4 Form that it was not availing the benefit of Modvat credit on inputs – Assessee, however, used indigenous inputs in the manufacture of export consignment and availed Modvat credit on the same – Exported finished* D *goods under the Advance Licencing Scheme without payment of duty – Reversal of credit and imposition of penalty by Revenue – Correctness of – Held: Correct – Entitlement to Modvat credit did not arise since no excise duty was incident upon the finished goods – Declarations under AR4 entitled* E *the assessee to import inputs on payment of the countervailing duty, which subsequently was permitted to be drawn back – The assessee not only availed of Modvat credit on the indigenous input, but also drew back countervailing duty paid on imported inputs that were mere stock replenishments* F *– This amounted to a double benefit – Tax/Taxation – Unjust enrichment.*

The assessee exported fabrics with a declaration on the AR-4 that they were not availing the benefit of credit. The export was made by them under the Advance G **Licencing Scheme against which they were entitled to receive replacement. However due to urgency of export order, they used indigenous inputs in the manufacture of the export consignment. Later on, when the replacement was received, they took modvat credit on the indigenous**

H

inputs. They also availed the benefit of drawback as the export was made by them under the drawback scheme. A

The question which arose for consideration in the instant appeal was whether the appellant-assessee was entitled to avail modvat credit on indigenous input. B

Dismissing the appeal, the Court

HELD: 1.1. A literal reading of the Rule 57A of Central Excise Rules, 1944 makes it amply clear that an entitlement to Modvat credit will arise only if excise duty is incident upon the final product. The final product in the instant case referred to the finished goods (PP fabrics) that were exported under the Advance Licensing Scheme without payment of duty. The declarations filed under AR4 entitled the assessee to import inputs on payment of the CVD, which subsequently was permitted to be drawn back. Therefore, the assessee had utilized the specified mechanism to avail of a benefit on the imported inputs, while availing of Modvat credit on the indigenous raw material used in the manufacture of the exported goods. In effect, the assessee has not only availed of Modvat credit on the indigenous input, but also drew back countervailing duty paid on imported inputs that were mere stock replenishments. This would amount to a double benefit. That the Modvat credit was technically claimed only subsequent to the filing of AR4 declarations, although the indigenous goods were used in the manufacturing process *a priori* does not also reflect well on the intention of the assessee. The assessee has merely resorted to the technicality of claiming Modvat credit subsequent to the AR4 declarations, thereby entitling it to drawback. Subsequently, the Modvat credit has been availed on the very same indigenous goods, which shows that the claim of the assessee to be legitimately entitled to two separate duties was but a facade. [Para 15, 16] [820-D-H; 821-A-B] C D E F G H

1.2. There can be no question of separate duties arising in the instant case since the issue concerns the manufacture and export of one and the same goods. The imported inputs were primarily stock replenishments that were used in the execution of other orders, and allowing the assessee to claim Modvat credit on the indigenous input would tantamount to giving a benefit twice for the same process that began with the manufacture and culminated in the export of the specified goods. The assessee cannot claim Modvat credit on finished goods where duty is not incident. Any attempt to avail it subsequently, casts serious aspersions on the *bonafide* intention of the assessee. The argument of the assessee that action had to be taken under the Duties Drawback Rules, 1971 and not through reversal of credit is not tenable. The reversal of credit is meant to deny the assessee of a benefit that they would have otherwise enjoyed without justification. The drawback equivalent to CVD is legitimately permissible by the process of AR4 declarations and, thus, it is the benefit that is enjoyed without justifiable basis that has to be reversed. [Para 17] [821-C-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10413 of 2010.

From the Judgment & Order dated 26.08.2008 of the High Court of Judicature for Rajasthan, Jodhpur, Bench at Jodhpur in D.B. Central Excise Appeal No. 9 of 2006.

R.P. Bhatt, Arijit Prasad, H.R. Rao, P. Parmeswaran for the Appellant.

Dr. Surat Singh, Pratibha Chopra, Ashok K. Mahajan for the Respondents.

The Judgment of the Court was delivered by

Dr. MUKUNDAKAM SHARMA, J. 1. Leave granted.

2. The assessee (appellant herein) seeks to challenge the judgment of the High Court of Rajasthan at Jodhpur in Central Excise Appeal No.9 of 2006. By its judgment and order dated 26.8.2008, the High Court dismissed the appeal, affirming the order of the Tribunal dated 4.7.2005, which had allowed the appeal of the Revenue and set aside the order of the Commissioner (Appeals), who in turn had set aside the order in original. By the order in original, the Assistant Commissioner had disallowed the Modvat credit of Rs. 5,37,799, and confirmed the recovery thereof, and also imposed a penalty of Rs. 50, 000 under Rule 173 Q (1) (bb) of the Central Excise Rules, 1944 (for short "the Rules").

3. The necessary facts, in brief are, that the show cause notice dated 15.2.1999 was issued to the assessee alleging that it had wrongly taken credit to the extent of Rs. 5,37,799 under Rule 57A of the Rules, during August 1998. The notice also called upon the assessee to show cause and explain as to why the aforesaid credit, wrongly taken by the assessee should not be disallowed/recovered under provisions of Rule 57-I, and also why penal action under Rule 173Q (1)(bb) should not be taken, and interest should not be charged under Section 11 AB.

4. The assessee is engaged in the manufacture of HDPE/ PP fabrics and bags, and was clearing the goods for home consumption on payment of central excise duty, as well as exporting the goods under bond without payment of duty, and was availing Modvat credit on the inputs under Rule 57A. The Revenue alleged that the assessee *vide* declarations in Form AR4 dated 4.8.1998, 17.8.1998 and 22.8.1998 had exported certain quantity of fabrics in its own account, and in the said AR4s had declared that the assessee had manufactured the fabric as mentioned in AR4, and that the benefit of Modvat under Rule 57A has not been availed, and also that it had not availed the facilities under Rule 12(1)(b) and 13(1)(b) of the Rules, and that export was made in discharge of export obligation under "advance licence" file.

A 5. It was alleged by the Revenue that the same was a false declaration, as the assessee has been availing Modvat credit on the inputs under Rule 57A. Likewise, in column 4 of the Form, the assessee had further declared that the export is under duty draw back, while on examination of Central excise records B and R.T.12 returns of the assessee, it was found that the assessee had taken Modvat credit on the inputs used in the manufacture of exported goods, and they had not received any duty free consignment of PP Granules (Inputs) from anyone for exporting the goods on its behalf till the date of above-said C exports, and that they had also not reversed any credit taken on the inputs used in the goods exported vide above referred AR4s. Thus, the assessee, it was alleged, had wrongly taken credit of Modvat, to the tune of Rs. 5,37,799, which was not admissible.

D 6. The Assessing Officer confirmed the demand, which was set aside in appeal, and was reconfirmed in further stages of appeal, as delineated above.

7. The High Court dismissed the appeal, holding that the E assessee had resorted to subterfuge and impermissible technicalities in attaining its desired end to claim the Modvat credit. While the High Court admitted that the assessee had not indeed claimed the Modvat credit on the inputs at the date when Form AR4s were submitted and the goods were exported, F it was held by the Hon'ble Court that the said line of argument could not make a case in favour of the assessee. The High Court arrived at this conclusion on a reading of the provisions enshrined in Rule 57A, Sub-rules (1) and (2), and on interpreting the declarations made under Form AR4 in context of the case. The High Court held:

G

"A reading of the [Rule 57A] does make it clear, that the Modvat credit is to be utilised towards payment of duty of excise, leviable on final products. Obviously therefore, the sine qua non for entitlement of Modvat credit is, that the H final product should have suffered the incident of excise

duty, and it is from out of that excise duty, that the credit of Modvat is availed by the assessee. In the present case, admittedly, the finished products have not suffered any excise duty, may be on account of resorting to any contrivance, or subterfuge, but the hard fact remains, that the finished goods have not suffered any excise duty, and therefore, per force the language of Rule 57-A, the assessee was not entitled to claim the credit of Modvat.

[...] the declaration was required to be considered in the right perspective, in as much as, the benefit of Modvat credit should not have been availed, not only at the precise point of time when the declaration is given, but the benefit should not have been availed with respect to the inputs used in manufacture of the finished products, which was sought to be exported under AR4. Obviously, not only at the cut off time of giving declaration AR4, but also at any time in future."

Based on this line of reasoning, the High Court deemed it fit to dismiss the appeal preferred by the assessee. Aggrieved by the decision of the High Court the appellant-assessee has approached this Court by way of this Special Leave to Appeal, on which we have granted leave.

8. The appeal was listed for hearing and we heard the learned counsel appearing for the parties who have ably taken us through all the relevant documents on record and also placed before us the various decisions which may have a bearing on the issues raised in the present appeal.

9. Before we outline the arguments led by the parties to this appeal, it would be appropriate to outline some of the facts which are beyond dispute. It is well-settled that the assessee had not claimed Modvat credit at the time when the declarations under Form AR4 were made. However, the assessee had in fact, claimed Modvat credit subsequently on the inputs used for the very same manufactured goods that were

A exported under AR4. In effect, the assessee had used indigenous duty-paid inputs, and the finished products were exported without payment of excise duty and subsequently, Modvat credit was claimed on such inputs. To explain further, we may elaborate briefly on the technicalities that made this B possible for the assessee.

10. In the normal course, an assessee is entitled to Modvat credit on the duty paid in the manufacture of finished products and it is from out of that excise duty, the Modvat credit is availed of by the assessee. In the case of imported raw materials, a C countervailing duty (CVD) has to be paid, equal to excise duty on such goods. On the other hand, an assessee who manufactures finished goods to be exported out of imported input material is given an "Advance License" to import the inputs required for the manufacture free from duty.

D

11. The case that is then made out by the assessee in the present appeal is that the goods exported by the assessee were manufactured out of indigenous goods, and hence Modvat credit could be claimed. At the same time, however, E credit for the CVD was availed of by the assessee in respect of the goods imported to be used in manufacture. Therefore, the crux of the entire case at hand is whether the assessee has been at the receiving end of a double benefit, having claimed credit twice for the raw materials used.

F

12. To fortify its stance, the assessee contended before this Court that it had taken credit of the duty on indigenous inputs only after the replenishment arrived. That is to say, the assessee had not claimed Modvat credit at the time the declarations under the advance license scheme were filed, but G only later. It was further contended by the assessee that it has not gained any extra benefit except as provided under law. While fulfilling the export obligation under the Advance Licensing Scheme, the assessee contends that it was entitled to avail credit on duty paid on indigenous inputs as well as on CVD in H lieu of excise duty paid on imported, replenished material. On

this count, it is the submission of the assessee that it has only availed Modvat credit on indigenous inputs and availed drawback on the export consignment as no credit was availed on CVD paid for the imported material. Therefore, any action that could have been taken against the assessee should have been made under the Customs and Central Excise Duties Drawback Rule, 1971 which was not done in the present case.

13. For its part, the Revenue has contended that the assessee has resorted to technicalities in order to avail the aforementioned double benefit. The essence of the argument led by the Revenue is that the Modvat credit availed relates to the same inputs which were used in the manufacture of exported goods under AR4. Since the assessee had exported the goods under AR4, claiming that no excise duty was payable on the exported goods, it was contended by the Revenue that no Modvat credit could be claimed in line with the provisions of Rule 57A.

14. In sum and substance, we are faced with a claim of the assessee that, in order to meet the exigency of the export order, the assessee used indigenous inputs for the manufacture of the export goods. Subsequently, when the 'replenishment' arrived in the form of imported goods, the assessee availed the drawback duty for the same. However, the question to note is whether there were two separate duties that arose, for the assessee to claim credit on both, or if the entire process is to be considered as a single cycle, which culminated in the export of goods under the Advance Licensing Scheme?

15. The statutory position regarding the specified benefits is postulated in Rule 57A of the Rules.

> "Rule 57A. Applicability.-(1) The provisions of this section shall apply to such finished excisable goods (hereafter, in this section, referred to as the final products) as the Central Government may, by notification in the Official Gazette, specify in this behalf for the purpose of allowing credit of

A any duty of excise or the additional duty under Section 3 of the Customs Tariff Act, 1975 (51 of 1975), as may be specified in the said notification hereafter, in this section, referred to as the specified duty) paid on the goods used the manufacture of the said final products (hereafter, in this B section, referred to as the inputs)

(2) The credit of specified duty allowed under sub-rule (1) shall be utilised towards payment of duty of excise leviable the final products, whether under the Act or under any other Act, as may be specified in the notification issued under C sub-rule (1) and subject to the provisions this section and the conditions and restrictions, if any, specified in the said notification."

A literal reading of the aforestated provision makes it amply D clear that an entitlement to Modvat credit will arise only if excise duty is incident upon the final product. The final product in this instance refers to the finished goods (PP fabrics) that were exported under the Advance Licensing Scheme without any payment of duty. Therefore, the attempt of the assessee to E justify its availing of Modvat credit is seriously undermined by the provisions in Rule 57A.

16. Subsequently, it is to be seen whether the claiming of Modvat credit after filing the declarations in Form AR4 would entitle the assessee to Modvat credit on the indigenous inputs. F The declarations filed under AR4s entitled the assessee to import inputs on payment of the CVD, which subsequently was permitted to be drawn back. Therefore, the assessee had utilized the specified mechanism to avail of a benefit on the imported inputs, while availing of Modvat credit on the G indigenous raw material used in the manufacture of the same, exported goods. In effect, the assessee has not only availed of Modvat credit on the indigenous input, but also drew back countervailing duty paid on imported inputs that were mere stock replenishments, which amounts to a double benefit. That the H Modvat credit was technically claimed only subsequent to the

filing of AR4 declarations, although the indigenous goods were used in the manufacturing process *apriori* does not also reflect well on the intention of the assessee. The assessee has merely resorted to the technicality of claiming Modvat credit subsequent to the AR4 declarations, thereby entitling it to drawback. Subsequently, the Modvat credit has been availed on the very same indigenous goods, which shows that the claim of the assessee to be legitimately entitled to two separate duties is but a façade.

17. There can be no question of separate duties arising in this case since the issue concerns the manufacture and export of one and the same goods. The imported inputs were primarily stock replenishments that were used in the execution of other orders, and allowing the assessee to claim Modvat credit on the indigenous input would tantamount to giving a benefit twice for the same process that began with the manufacture and culminated in the export of the specified goods. The assessee cannot be held to be not entitled to claiming Modvat credit on finished goods where duty is not incident. Any attempt to avail it subsequently, casts serious aspersions on the bonafide intention of the assessee. The argument of the assessee that action had to be taken under the Duties Drawback Rules, 1971 and not through reversal of credit does not bear merit. The reversal of credit is meant to deny the assessee of a benefit that they would have otherwise enjoyed without justification. The drawback equivalent to CVD is legitimately permissible vide the process of AR4 declarations and thus, it is the benefit that is enjoyed without justifiable basis that has to be reversed.

18. In light of the aforesaid facts and circumstances, we find that the contentions of the assessee are without merit. We dismiss the appeal filed by the assessee, but leave the parties to bear their own costs.

D.G. Appeal dismissed.