# 2012 (276) E.L.T. 12 (Kar.)

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

(CIRCUIT BENCH AT DHARWAD)

**V.G. Sabhahit and B. Manohar, JJ.**

**COMMISSIONER OF CENTRAL EXCISE, BELGAUM**

*Versus*

**GOKAK MILLS**

*Central Excise Appeal No. 56 of 2007 with C.E.A. No. 57 of 2007, decided on 29-7-2011*

**Cenvat credit - Availment of - EOU selling to DTA unit excess power generated by it, on payment of amount equal to duty leviable on consumables used for generation of each unit of power so sold, which would have been leviable if exemption was not available - Intimation regarding same given to jurisdictional authorities - *HELD :* Sale was in accordance with para 7 of Notification dated 20-2-2003 and amount paid by EOU has to be treated as duty, for which Cenvat/Modvat credit can be taken.** *[para 12]*

***Appeals dismissed***

**CASE CITED**

Collector v. Sarabhai International Ltd. — 2000 (119) E.L.T. 6 (S.C.) — *Followed.* [Paras 7, 11, 12]

REPRESENTED BY : Shri S.N. Rajendra and N.R. Bhaskar, Advocates, for the Appellant.
Shri K.S. Ravishankar, Advocate, for the Respondent.

**[Judgment per : V.G. Sabhahit, J.].** - These two appeals are disposed of by this common order since common question of law is involved and the order is in respect of the same assessee for different periods.

**2.** Appeal 57/2007 is filed by the revenue being aggrieved by the order passed by the Customs, Excise and Service Tax Appellate Tribunal, Bangalore (hereinafter referred to as "CESTAT") in E. Appeal No. 1066/2005, dated 11-10-2006 [2007 (210) E.L.T. 241 (Tribunal)] which pertains to the period from May 2004 to November 2005 and Appeal 56/2007 is filed by the revenue being aggrieved by the order of the Tribunal in E. Appeal No. 543/2006 wherein the order which is impugned in CEA 57/2007 has been followed for the period from December 2004 to May 2005.

**3.** The appeals have been admitted for consideration of the following substantial question of law :

> "Whether the finding of the Tribunal that where one unit generates power and the neighbouring unit purchases the same, the inputs used for generation of power would be entitled for modvat credit in respect of the second unit which purchases power provided there is evidence of an amount equal to the amount of duty on the inputs used in generation of power and amount equal to duty should be considered as duty for availing cenvat credit, is perverse and arbitrary?"

**4.** We have heard the learned counsel appearing for the appellant-revenue and the learned counsel appearing for the respondent.

**5.** Learned counsel appearing for the appellant-revenue submitted that the order passed by the Tribunal holding that amount equal to duty should be considered as duty for availing cenvat credit though cannot be treated as amount paid as duty and wherefore the Tribunal was not justified in forwarding cenvat credit in favour of the respondent. It is contended that show cause notice was issued on 18-2-2005 stating as to why the cenvat credit for the period from May 2004 to November 2005 in Appeal No. 57/2007 and December 2004 to May 2005 should not be dis-allowed and amount should not be recovered with interest. Reply was given to the said show cause notice and the original authority in both the cases rejected the explanation given in the show cause notice and held that the respondent was not entitled to cenvat credit as claimed and accordingly, dis-allowed the same and ordered for recovery of amount with interest by order dated 8-9-2005 and it was ordered that cenvat credit of Rs. 61,38,256/- shall be demanded along with the interest under Rule 12 of erstwhile Cenvat Credit Rules, 2002 and Rule 14 of the Cenvat Credit Rules, 2004. Similar order was passed pertaining to the period December 2004 to May 2005 by the original authority rejecting the claim of the respondent regarding eligibility for availing credit under Cenvat credit and ordered that Rs. 48,99,321/- with interest under Rule 12 of erstwhile Cenvat Credit Rules 2002, read with Rule 14 of Cenvat Credit Rules, 2004, shall be levied. Being aggrieved by the same in both the appeals, the same assessee preferred appeals to the Tribunal and the Tribunal by order dated 26-10-2006 and 15-11-2006 allowed the appeals and upheld that the cenvat credit availed by the respondent by holding that what was paid by the respondent was the amount equal to duty which must be interpreted as amount to duty in lieu of the terms of payment required to be paid under the notification dated 31-3-2003 and negatived the contention of the revenue that the payment made by the respondent cannot be treated as payment of duty, it should be treated as payment of duty only as obligation is on the purchaser to make payment of value of raw material which is equalent to duty imposed. The duty leviable is equalent to the cost of raw material duty leviable: Being aggrieved by the said order of the Tribunal, these appeals are filed by the revenue.

**6.** Learned counsel further submitted that excise duty is payable by the manufacturer of the electricity and the vendor and not by the respondent and wherefore, the respondent could not have availed the cenvat credit under the original authority and the order has been wrongly set aside by the appellate Tribunal and wherefore the finding of the Tribunal is erroneous, perverse and arbitrary and substantial question of law be answered in favour of the revenue.

**7.** On the other hand learned counsel for the respondent in both the appeals submitted that in view of the notification, it is clear that the sale of electricity which was found to be in excess by the EOU to the DTA was made available only after getting opinion of the Superintendent of Central Excise, Gokak Range, Hospet wherein they have permitted to sell electricity subject to para 7 of the notification and wherefore the only obligation to clause 7 of the notification, the liability is on the purchaser to make payment equal to duty leviable on consumables and raw materials, but for exemption of the duty thereon used for generating each unit of power sold in DTA on the basis of norms approved by the Board of Approval and wherefore the finding of the Tribunal which is based upon the said notification and the decision in *Collector of Customs, Rajkot* v. *Sarabhai International Ltd.*, reported in 2000 (119) E.L.T. 6 (S.C.) is justified and wherefore the substantial question of law may be answered against the revenue.

**8.** We have given careful consideration to the contentions of the learned counsel for the parties and scrutinized the material on record.

**9.** The material on record would clearly show that admittedly, the EOU unit M/s. Forbes Gokak Limited 100% EOU unit is manufacturing electricity. However, though the generation of electricity is for captive use, if the electricity manufacture is found to be excess, the same is permitted to sell under the notification dated 20-2-2003 and the material on record would clearly show, before transfer of excess power generated by M/s. Forbes Gokak Limited to the DTA-the respondent, correspondence was made to the Superintendent of Central Excise, Gokak Range, Hospet and the EOU unit was permitted to sell the electricity subject to compliance with para 7 of the notification. The said condition in para 7 of the notification reads as follows :

> "7. Without prejudice to other provisions of this notification, where the said officer is satisfied that the user industry, which has been permitted by the concerned State Electricity Board in this behalf and has been permitted by Development Commissioner to sell into Domestic Tariff Area or transfer to other export oriented undertaking or Software Technology Park (STP) unit or Electronic Hardware Technology Park (EHTP) unit or unit in special economic zone, the surplus power generated in its diesel generating sets or captive power plant subject to fulfilment of such conditions as may be specified by the said officer on this behalf, the said officer may allow the user industry -
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> (i) to sell such surplus power of Domestic Tariff Area on payment of an amount equal to the duty leviable on consumables and raw materials but for the exemption of duty thereon, used for generation of each unit of power so sold in the domestic Tariff Area on the basis of norms approved by the Board of Approval;
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> (ii) to transfer such surplus power to other export oriented undertaking or Software Technology Park (STP) unit or Electronic Hardware Technology Park (EHTP) unit or unit in special economic zone without payment of duty;
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> Provided that both supplying and receiving unit shall maintain account for the quantity of consumables and raw materials used in generation of each unit of power so transferred as quantified on the basis of norms approved by the Board of Approval, for the purpose of calculation of Net Foreign Exchange Earning (NFE)."

**10.** It is clear from the above said clause that EOU unit which has established captive power plant can sell electricity found to be excessive subject to the condition mentioned there on and to sell surplus power in Domestic Tariff Area on payment of amount equal to the duty leviable on consumables and raw materials but for the exemption thereon, used for generation of each unit of power so sold in the domestic Tariff Area on the basis of approval by the Board of Approval. It is not in dispute in the present case that EOU unit is exempted from payment of duty in respect of consumption of electricity manufactured by it. However, when the electricity which his found to be in excess is sold to DTA, the same is subject to the condition that the said sale shall be on payment of amount equal to duty leviable on consumables and raw materials but for the exemption of duty thereon and wherefore it is clear that the payment that has been made as consideration for sale is the amount equal to duty leviable on consumable and raw materials but for the exemption of duty thereon, is equalent to duty payable.

**11.** Hon'ble Supreme Court in *Collector of Customs Rajkot* v. *Sarabhai International Ltd.*, 2000 (119) E.L.T. 6 (S.C.) in para 5 has observed as follows :

> "5. In our view, the obligation of the respondents must be determined solely upon the basis of the said notification, dated 17th April, 1980. They were exempted form paying the "duty leviable" on the imported soda ash that they cleared into the Free Trade Zone by reason of that notification. It was a condition of that notification that they would pay on demand on the soda ash that they had not used in connection with the production of detergent power within the Free Trade zone an "amount equal to the duty leviable" thereon. In other words, it was clearly a condition of the said notification that the respondents would pay on the surplus soda ash the amount of the duty, which had not been paid thereon when the soda ash was cleared into the Free Trade Zone. It must, therefore, be held that the respondents are liable to pay the amount of the duty that would have been leviable on the surplus soda ash had it not been cleared into the Free Trade Zone under the said notification.

**12.** Therefore, in view of the conditions imposed in the above said notification for sale of excess power and the decision of the Supreme Court, we hold that the order passed by the Tribunal is justified and the finding that the respondent is entitled to cenvat credit and the same could not have been recalled. does not suffer form anv perversitv. arbitrariness and is based upon the law laid down by the Supreme Court and the conditions of the notification and accordingly, we answer the substantial question of law against the revenue and in favour of the respondent and hold that both the appeals are devoid of merit and pass the following order.

**13.** Appeals 56/07 and 57/07 are dismissed.

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