IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

EASTERN ZONAL BENCH: KOLKATA

Date of Hearing & Decision: 14/06/2018

Excise Appeal No. E/81/2008

(Arising out of Order-in-Original No. 62/Commr./Bol/07 dated- 25/09/2007 passed by the Commissioner of Central Excise, Bolpur)

Xpro India Ltd. **Applicant (s)/Appellant (s)**

vs.

CCE-Bolpur. **Respondent (s)**

Appearance:

Shri Ravi Raghavan Adv.

for the Appellant (s)

Shri D. Haldar, AC(AR) for the Respondent (s)

CORAM:

Hon'ble Shri P.K.Choudhary, Member (Judicial)
Hon'ble Shri Bijay Kumar, Member (Technical)

Final Order No. FO/A/76841/2018

Per Shri Bijay Kumar

1. The appellant has filed the impugned order being aggrieved with the impugned order, Order-in-Original No. 62/Commr./ BOL/ 07 dated 25th September, 2007.

2. The issued involved in this case is that the appellant is manufacturer of BOPP films, (biaxially Oriented Polypropylene Films), SH No. 3920.30 and availed the Modvat credit on Polypropylene Granules (SH No. 3902.10) but cleared waste and scrap of plastics, arising from processing of such inputs, without payment of Central Excise Duty. In terms of Notification No. 14/92 dated 1/3/1992 waste, paring and scrap of plastics falling under sub-

heading No. 39.15 are chargeable to nil rate of duty, if such waste arises from goods under Chapter 39 of CETA, 1985 on which duty has been paid, and if this condition is not fulfilled such waste is chargeable to Central Excise duty. Again, under Rule 57 F (4)(a) of the Central Excise Rules 1944, any waste material arising from processing of input in respect of which credit has been taken may be removed on payment of duty, as if such waste is manufactured in the factory. But the appellant availed Modvat credit of Polypropylene and cleared the waste and scrap of plastic arising from processing of such inputs without payment of duty. The appellant has also manufactured reprocessing granules (RPG) falling under Chapter No. 390210 of CETA,1985 out of waste and scrap of plastic arising from the processing of imported and indigenous polypropylene granules. On scrutiny of the records, it was revealed that the assessee has cleared the said RPG without payment of Central Excise duty availing the benefit of S. No. 42 of Notification No. 42/92 dated 1/3/92. The assessee has also mentioned this fact in their relevant Classification Lists that is the RPGs are being manufactured from the duty paid waste, paring and scrap of plastic material on which Modvat credit had been availed. And the Revenue entertained the view that proportionate Modvat credit on the input, that is PPG granules (imported from indigenous), were required to be reversed as per Rule 57C of the Central Excise Rules, 1944. Therefore, it was alleged that the appellant has irregularly availed Modvat credit amounting to Rs. 1,71,26,749.90/-. It was held in the impugned order that assessee has not informed the Department in any manner about the activity of manufacturing RPG and even they have not followed the terms and conditions of the said Rule and Notification No. 14/92 dated 01/03/92. It was held that the appellant had will fully availed the Central Excise duty availed the irregular Modvat Credit.

3. Ld. Advocate on behalf of the notice, among other things, submitted that the similar issue has been decided by the Hon'ble CESTAT West Zonal Bench,(Mumbai) in case of ***Commissioner of Central Excise and Customs, Aurangabad vs. Cosmo Films Ltd.*** 2014 (307) ELT 967 (Tri-Mum), wherein it is held that the benefit of Notification No. 53/88 cannot be denied on waste and paring of plastic manufactured from the duty paid products. And also plastic waste of scrap arising in the course of BOPP films cannot be considered as final product and thus credit was rightly taken under the provisions of Modvat Rule. It was held that in this case there was no production of waste and scrap of plastic but the same has arisen as a by-product of manufacture. In addition to above, the Ld. Advocate also submitted that in this case the appellant has filed the Classification List disclosing the fact about manufacturing of RPGs from waste and scrap of plastic, which has been approved by the Department. In the circumstances, it cannot be assumed that there was any malafide on their part as this fact was known to the Department as the Classification List has already filed under Section 173 (B) of the Central Excise Act 1944 and which was duly approved by the proper officer.

4. On the other hand, Ld. AR reiterated the ground contained in the impugned order and stated that in this case the appellant has themselves classified the goods in the classification list, and therefore, the processed granules cannot be considered as the bye-product. From the adjudication order it is also evident that the manufacturer has specially installed a scrap plant for the manufacture of RPG which was being used for the manufacture of BOPP films along with the virgin PP granules. Therefore, it was vehemently argued that the impugned order does not suffer from any infirmity and the case laws sited by the Ld. Advocate on behalf of the appellant cannot be relied upon.
5. We have considered the rival contentions and also perused the case records.
6. It is held in the adjudication order as per Rule 57C of the Modvat credit Rule Credit of duty is not to be allowed if final products are exempt. Section 57C is reproduced as under;

   Rule 57C. **Credit of duty not to be allowed if final products are exempt.**- No credit of the specified duty paid on the inputs used [in the manufacture of a final product] (other than those cleared either to a unit in a Free Trade Zone or to a hundred per cent Export-Oriented Unit)] shall be allowed if the final product is exempt from the whole of the duty of excise leviable thereon or is chargeable to nil rate of duty.

7. In this case the assessee took the credit on the PPG granules and used the same in relation to manufacture of BOPP Films. During the manufacturing process of BOPP Film western scrap is generated. A part of the waste and

scrap captivity consumed for the manufacture of re-processed Polypropylene granules, a part of which is used along with the Polypropylene granules in relation to manufacture of BOPP Films. And the rest of the RPG was also being cleared on payment of nil rate of duty during the impugned period from (April, 1992 to February, 1994). Adjudicating Authority has treated the RPG granules as manufactured product instead of by-product and waste scrap arising out during the course of manufacturing activity, as the appellant undertakes the manufacturing activity by reprocessing of the waste and scrap for manufacture of RPG granules. The Adjudicating Authority has taken a view that the as per Section 57C of the Central Excise Rule which states that no credit of specified duty paid on the input used in the manufacture of final product shall be allowed if the final product is exempt from the whole of the duty of Excise leviable thereon or chargeable to nil rate of duty. However, we find that the Adjudicating Authority has mis-directed himself in arriving at the aforesaid conclusion. We find that the present issue is squarely covered by this Hon'ble Tribunal's decisions in case of ***Cosmo Films (supra)*** wherein it is held as under;

> *5.1 As regards the contention of the Revenue that once credit has been taken, the inputs become non-duty paid, this contention is not based on any provision of law. Nowhere in the Central Excise Act or Rules, it is stated that when the credit is taken, the input becomes non-duty paid. Payment of duty is a question of fact and once duty is paid, the product remains duty-paid and that fact cannot be erased or obliterated on what happens subsequently. Therefore, as rightly observed by this Tribunal in the case of MRF Ltd. (supra) and*

Supreme Industries-2002 (148)ELT 484, affirmed by the Apex Court [2003 (153) ELT A 91(SC)] by taking credit, the inputs do not become non-duty paid. The very fact that the credit has been allowed itself it a proof that duty has been paid on the inputs and without payment of duty, no credit can be taken. Therefore, benefits of Notification No. 53/88 cannot be denied on waste and scrap of plastic manufactured from duty paid inputs.

5.2 As regards the question, whether waste and scrap is a final product or a by-product, this issue has been settled by the Hon'ble High Court of Allahabad [2013-TIOL-557-ALL-CX=2014(300) ELT 372(All.)] Wherein it was held that bagasse which arose in the course of sugar is only a waste product and is not a final product. Adopting the ratio of the decision to the facts of the present case, plastic waste and scrap arising in the course of BOPP films cannot be considered as a final product and it is only a by-product and ,therefore, provisions of Rule 57D is applicable to the facts of the present case and the respondent has rightly taken the credit on the inputs contained in the waste and scrap of plastics which has been arisen as by-product in the course of manufacture of BOPP films.

5.3 Rule 57D, as it stood at the relevant time, clearly laid down that credit of specified duty allowed in respect of any inputs shall not be denied or varied on the ground that part of the inputs is contained in any waste, refuse or by-product arising during the manufacture of final product, whether or not such waste, refuse or by-product is exempted from whole of the duty of excise thereon or is chargeable to nil rate of duty or is specified as a final product under Rule 57A

8. Similar view has been taken by the Tribunal in case of ***Collector of Central Excise, Chandigarh vs. Maxon India Ltd.*** 1994 (72) ELT 483 (Tribunal) wherein it is held by the majority decision that the credit of input contained in the waste arising during the manufacture of BOPP film is covered by Rule 57D of Central Excise irrespective of quantum of waste.
9. Further, we also find that the similar view has been taken by the Tribunal in case of ***Commissioner of Central Excise and Customs, Aurangabad vs. Prime Plastic Pvt. Ltd.*** 1999(112) ELT 337(Tribunal). The relevant paragraph of the aforesaid order is reproduced as under:

> *"However, we find on consideration of the submissions that the reliance placed by the Commissioner (Appeals) in the Tribunal decision in the case of M/s Anil Starch Products (supra) is well founded. In that case also the department sought to reverse the duty on the Mother Liquor which was drawn on and there was the emergence of Hydrol which was not chargeable to duty. The department's case was, that portion of the Modvat credit contains in the Hydrol which is subject to 'nil' rate of duty should be reversed. The Tribunal held that Hydrol was only a bye-product and it was not the final product declared by the assessee. In such a situation Rule 57C will not be attracted. We also find that in another case when the department sought to recover proportionate credit of duty on Sulphur Acid used in the manufacture of Hydrol the Tribunal took the similar view and held that the Sulphur Acid has considered as a bye-product and the credit of duty on input contained therein will be protected by the provisions of Rule 57D."*

10. The ratio laid down in the aforesaid decisions is squarely applicable in this case. The waste and scrap of plastic emerges as the by-product and not as a final product.

11. In view of the above, we are of the considered opinion that the impugned order is not sustainable and accordingly we set aside the same and allow the appeal.

(Operative part of the order already *Pronounced in the Court*)

Sd/ Sd/

(P.K.Choudhary) **(Bijay Kumar)**
MEMBER(JUDICIAL) **MEMBER(TECHNICAL)**

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