(2000) 12 GUJ CK 0016

In the Gujarat High Court

Case No : Central Excise and Customs Gold Control AP No. 24 of 2000

ACCE — APPELLANT

Vs

Priyakant Carbon and Chemical Industries Pvt. Ltd. — RESPONDENT

Date of Decision : 04-12-2000

Acts Referred:

Citation : (2001) 96 ECR 17

Hon'ble Judges : D.M. Dharmadhikari, C.J;M.S. Shah, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

M.S. Shah, J.—This application has been preferred by the Assistant Commissioner, Central Excise (Rural Division), Ahmedabad-II praying for a direction to the Customs, Excise & Gold (Control) Appellate Tribunal, West Regional Branch at Mumbai to refer the following substantial question of law involved in the present case for the decision of this Court:

Whether MODVAT credit is allowable on the gate passes which were endorsed more than twice when there is Board''s order file No. 267/40/90-CX-8 Circular No. 22/90 dated 9.4.1990 which put embargo to avail Modvat credit of GPIs endorsed more than twice and also clarified in the Board''s order that the decision of the Tribunal in case of 1990 (25) ECC 142 would be applicable for individual case and not as a sole (i.e. it will be applicable to another case for availing Modvat credit).

2. The facts leading to the present application briefly stated are as under:

2.1. Prior to 1.4.1994, for availing of MODVAT credit, the claimant had to produce the gate pass issued by the manufacturer of the input. In a given case, it would happen that the purchaser of the input may not use it for manufacturing another product, but, may resell the input to another party. There can also be a second sale of such input before the input reaches the final user, i.e., the manufacturer of the end product. In the result, gate pass originally issued by the manufacturer of the input was being endorsed once, twice or even thrice or many times, as the input would change hands. To deal with this situation, the Central Board of Excise and Customs (the Board) issued a Circular dated 17.4.1989 clarifying that the original gate passes which were endorsed once could further be endorsed once (i.e. in all twice) provided the entire goods covered by the gate passes are transferred to the third party in original packing.

2.2. In the case of 1990 (25) ECC 142 , the CEGAT, West Regional Bench, Bombay permitted availment of MODVAT credit on gate passes endorsed thrice on the rationale that when the Board itself had decided to relax the procedural requirement by way of administrative instruction, it should be the endeavour of the authorities to extend MODVAT credit wherever the duty paid nature of the goods is evident from the gate passes produced and quantum of duty paid on the inputs can be ascertained therefrom.

2.3. The above decision of the Tribunal was not challenged, but, the Central Board of Excise and Customs, New Delhi issued another Circular dated 9.4.1990 stating that the Tribunal''s decision in the case of SBS Organics (supra) is in variance with the Board''s instructions dated 17.4.1989 and the same may be considered as an exception and would be made applicable to the individual case, if any, for grant of MODVAT credit and it should not be made applicable to the gate passes which were endorsed more than twice. The Circular further stated that the Board''s Circular dated 17.4.1989 should be followed rigidly.

2.4. In the facts of the present case, the gate passes in question were endorsed thrice i.e., once by the manufacturer of the inputs and on the next two occasions by the dealers before the inputs used in manufacturing a finished product by the respondent assessee. In short it was under the third endorsement that the respondents had purchased and taken the inputs in question. In that view of the matter, the Department disallowed the respondent assessee''s claim for MODVAT credit amounting to Rs. 2,34,499.95 ps. The Assistant Commissioner, Central Excise and Customs allowed the respondent assessee''s claim for MOD-. VAT credit on the basis of the decision of the Tribunal in SBS Organics (supra), but the Department carried the matter before the Commissioner of Central Excise and Customs (Appeals), who allowed the Appeal by order dated 20.7.1999 relying on the Board''s Circular dated 9.4.1990. The respondent assessee, therefore, carried the matter before the CEGAT, West Regional Bench, Bombay which upheld the assessee''s claim for MODVAT credit on the ground that the facts in the case were similar to the case of SBS Organics (supra). Hence, the Department has filed the present application for a direction to the Tribunal to refer the above quoted question of law.

3. At the hearing of the application Mr. B.I. Mehta, learned Additional Standing Counsel for the Department has submitted that when the Board had again issued the subsequent Circular dated 9.4.1990 putting embargo on the number of endorsements on the gate passes for availing MODVAT credit to two, it was not proper for the Tribunal to grant the benefit of MODVAT scheme on the third

endorsement by relying on the decision of the Tribunal in the case of SBS Organics (supra). It was submitted that Tribunal ought to have followed the subsequent Circular dated 9.4.1990 instead of following the decision of the Tribunal in the case of SBS Organics (supra).

4. On the other hand, Mr. Dave, the learned Counsel for the respondent assessee submitted that once the Tribunal had rendered a decision, the Board had no authority to render the same nugatory by merely issuing another Circular. In support of this contention, the learned Counsel relied upon the decision of this Court in Indichem Vs. Union of India, and Raymon Glues & Chemicals and Anr. v. Union of India and Ors. 1999 (34) RLT 243 (Guj) : 2001 (96) ECR 25 (Guj). It is further submitted by Mr. Dave that the system of gate passes has been done away W.e.f. 1.4.1994 and the whole scheme has been discontinued after 30.6.1994. It is further stated that in the facts of the case, there is no dispute about the fact that excise duty was paid on the input in question by the manufacturer thereof and also about the fact that the goods in question were received by the respondent assessee in original packing. Hence, it is not a fit case for directing the Tribunal to refer the above quoted question as six years have already elapsed and not many such cases are likely to recur.

5. Having heard learned Counsel for the parties, it appears to us that since the only question sought to be raised is regarding applicability of the second Circular dated 9.4.1990, we are not inclined to entertain this application. It is true that the decision of the Tribunal in SBS Organics (supra) was beyond the Board''s previous Circular dated 17.4.1989 as regards the number of endorsements which could be permitted on the gate passes for availing the MODVAT credit, but the remedy of the Department was to challenge the said decision of the Tribunal or to get the principle tested in any other matter. The Board could not have rendered the decision of the Tribunal nugatory by simply issuing another Circular stating that the benefit of the decision of the Tribunal in SBS Organics case may be given in any other case. The aforesaid two decisions of this Court make this legal position amply clean. Therefore, we are not required to say anything more.

6. Although the Department has not raised any question about the correctness or otherwise of the decision of the Tribunal in the case of SBS Organics (supra), Mr. Mehta urges that the said question can also be examined in the present case by redrafting the question. However, in view of the fact that the system of gate passes is done away with for the last more than six years, and in view of the undisputed facts that excise duty was paid on the input by its manufacturer and the goods were received by the respondent assessee in original packing, we are not inclined to issue any direction to the Tribunal to refer such a question to this Court.

7. In view of the aforesaid discussion, the application is dismissed with no order as to costs.

