(2008) 10 GUJ CK 0062

In the Gujarat High Court

Case No : Tax Appeal No. 930 of 2007

Ashish Metal Rolling Mills (presently known as Ferromet) APPELLANT

Vs

Commissioner of Central Excise RESPONDENT

Date of Decision : 16-10-2008

Acts Referred:

Central Excise Rules, 1944 — Rule 233B

Citation : (2009) 234 ELT 201 : (2010) 18 STR 531

Hon'ble Judges : D.A. Mehta, J;Abhilasha Kumari, J

Bench : Division Bench

Advocate : Uday Joshi, for Trivedi and Gupta, for the Appellant; Harin P. Raval, for the Respondent

Final Decision : Allowed

Judgement

D.A. Mehta, J.—The appellant has proposed the following two questions:

(I) Whether in the facts and circumstances of the case, the Customs, Excise and Service Tax Appellate Tribunal was in error in holding that both the lower authorities had rejected the refund claim filed by the appellant on the ground that the respondent had failed to discharge the burden as regards payment of duty having not been passed on to others?

(II) Whether in the facts and circumstances of the case, the Customs, Excise and Service Tax Appellate Tribunal was justified in allowing Appeal No. E/2552/02-MUM filed by the Commissioner of Central Excise, Ahmedabad-1?

2. Heard learned advocates for both the sides. The appeal requires to be admitted on the following substantial question of law:

Whether on the facts and in the circumstances of the case, the Customs, Excise and Service Tax Appellate Tribunal could have passed the order on 5.1.2007 when, admittedly, the hearing had taken place on 7.6.2004 without according a fresh opportunity of hearing to the parties?

3. The brief facts necessary for the present are that the appellant claimed refund of duty for the period 13.10.1980 to 19.10.1986. The claim of the refund amounted to Rs. 13,64,368/-. The adjudicating authority held that refund was not grantable to the appellant because of application of principle of unjust enrichment.

4. When the appellant-assessee carried the matter in appeal, Commissioner (Appeals) held as under:

7. From the SCN, I find that amount of refund claimed for the entire period is Rs. 13,64,368/- (Thirteen Lacs sixty four thousand three hundred sixty eight only). As per para 2 of the SCN, the claim amount for the period 13.10.80 to 1.10.83 i.e. upto the date of filing protest letter is stated to be Rs. 4,40,290/- (Four lacs Forty Thousand two Hundred Ninety only). Thus an amount of Rs. 9,24,078/- (Nine lacs Twenty Four Thousand and Seventy eight only) which was paid under protest after 1.10.83 is admissible as refund.

5. Against the order of Commissioner (Appeals), Revenue preferred second appeal before the Tribunal. The Tribunal has passed the following order:

1. Heard both sides. This is an appeal filed by the Revenue. The issue relates to refund claim. The refund claim appears to have been rejected by the Adjudicating Authority inter alia on the ground that the appellant has failed to follow the procedure laid down under Rule 233B of Central Excise Rules, 1944. While rejecting the claim, the Adjudicating Authority has also noted that the claim is time barred. He has also taken the principle of unjust enrichment while rejecting the refund claim. The chartered Accountant''s Certificate filed by the Respondent has been rejected by both the Lower Authorities as the same has not been found adequate and satisfactory.

2. The Hon''ble Supreme Court in the case of Sahakari Khand Udyog Mandal Ltd. Vs. Commissioner of Central Excise and Customs, and Parle International Ltd. reported in 2005(188) ELT 81 (SC) has held that in the absence of burden of unjust enrichment having been discharged by the assessee, the question of refund does not arise. Therefore, when I find that both the lower authorities have rejected the refund claim on the ground that the respondent has failed to discharge the burden, I do not find any illegality in the order passed by them. The Commissioner (A) wrongly appears to have allowed part of the claim that the Respondent can not pass on the burden of unjust enrichment. I, therefore, set aside the impugned order and allow the appeal filed by the Revenue. The Written submissions filed by the Respondent has been duly considered while allowing the appeal filed by department.

6. As can be seen from the first page of the impugned order of Tribunal, the order itself records the date of hearing and the date of decision as 7.6.2004 and 5.1.2007 respectively. In light of the fact that a period of nearly 2-1/2 years had elapsed between the date of hearing and the date of order, the impugned order of Tribunal reflects that the Tribunal has mixed up the facts of the case, possibly

with some other case. As noticed herein-before, Commissioner (Appeals) had not rejected the refund claim on the ground that the respondent had failed to discharge the burden. In fact, Commissioner (Appeals) has partly allowed claim by noting that the appellant had paid certain amount of duty after 13.10.1983 under protest and hence refund to the tune of Rs. 9,24,078/- was admissible. Despite this, the Tribunal has held that Commissioner (Appeals) has wrongly allowed part of the claim.

7. Furthermore, as can be seen from the last sentence of the impugned order, without recording as to what was the contention raised in the written submissions filed by the respondent-assessee, the Tribunal has merely recorded that the written submissions filed by the respondent have been duly considered. The placement of the sentence itself indicates that the said sentence has been inserted after the order was made.

8. In the aforesaid circumstances, without recording any opinion on merits of the dispute between the parties as to entitlement and admissibility of the refund claim claimed by appellant-assessee, Appeal No. E/2552/2002 is required to be heard afresh by the Tribunal.

9. Accordingly, impugned order dated 5.1.2007 made by the Tribunal is hereby quashed and set aside. The appeal stands restored to file of the Tribunal for deciding afresh after hearing both the sides. This Tax Appeal is allowed accordingly with no order as to costs.