

(2017) 06 GUJ CK 0007
In the Gujarat High Court
Case No : 7339 of 2017

CENTURION LABORATORIES PRIVATE LIMITED & ANR. APPELLANT
Vs
UNION OF INDIA & ORS. RESPONDENT

Date of Decision : 09-06-2017

Acts Referred:

[Central Excise Rules, 2004](#), Rule 18, Rule 19

Citation : (2017) 06 GUJ CK 0007

Hon'ble Judges : S.R.Brahmbhatt, A.G.Uraizee

Bench : Division Bench

Advocate : RAJ K VYAS, DEVANG VYAS, ANKIT SHAH

Judgement

1. Shri Ankit Shah, learned ASG makes a statement that order produced at page 21 squarely covers the issue and Department has not challenged the same in any respect. The Court may pass appropriate order.

2. Rule. Shri Vyas, learned ASG and Shri Shah, learned advocate waives service of notice of Rule on behalf of respondent Nos. 1 and 2 & 3 respectively. By consent, Rule is fixed forthwith.

3. By this petition under Article 226 of the Constitution of India, the petitioners have challenged the orders (i) Rebate/1543- 1561/ Centurion/Div-I/16-17 dated 28.11.2016; (ii) Rebate/1584-1585/ Centurion/Div-I/16-17 dated 29.11.2016; (iii) Div-III/CE/175-179/Reb/16-17 dated 30.12.2016; (iv) Div-III/CE/125-127/ Reb/16-17 dated 18.12.2016; (v) Rebate/1898-1903/Centurion/Div-I/16-17 dated 12.01.2017 & (vi) Div-III/CE/198-200/Reb/16-17 dated 15.02.2017, passed by the Assistant Commissioner, Vadodara (Annexure "K" to the petition), whereby he has rejected the rebate claim of the petitioners on the ground that the same is directly opposed to the judgment of this court in the case of Zenith Spinners v. Union of India, 2015 (326) ELT 97 (Guj.).

4. The first petitioner, a company, is engaged in the manufacture of various pharmaceutical products. During the course of its business, the first petitioner

either sold in the local market or exported such products and received various kinds of inputs which were duty paid. The petitioners availed of Cenvat credit on such inputs, inasmuch as, they had paid for such credit in the purchase price of the goods. In the normal course of business, the petitioners also obtained certain inputs without payment of duty under the procedure prescribed under rule 19 of the Central Excise Rules, 2004 (hereinafter referred to as "the rules"). Rule 19 of the rules permits purchase of inputs required to be used for exporting the goods without payment of duty on following the procedure prescribed under Notification No.43/2001-C.E.(N.T.) dated 26.06.2001. The petitioners had also obtained certain inputs by following the said procedure under the rules. The first petitioner exports various kinds of pharmaceutical products.

5. It is the case of the petitioners that the Central Excise Act, 1944 (hereinafter referred to as "the Act") permits export of goods either without payment of duty or under bond under rule 19 of the rules or permits export of goods on payment of duty on the claim of rebate of duty paid under rule 18 of the rules. The petitioners exported their goods on payment of duty and not under bond. Since their exports were duty paid, the petitioners claimed rebate of duty paid thereon under rule 18 of the rules. In connection with the rebate claims, the petitioner received 11 show cause notices issued by the Department, which sought to place reliance upon the amendment in rule 19 of the rules by virtue of Notification No.10/2014. It is the case of the petitioners that during the course of the adjudication proceedings it was pointed out to the adjudicating authority that the said notification had been declared ultra vires the rules by this court in the case of Zenith Spinners v. Union of India (supra) and hence could not be relied upon. Despite the aforesaid position, the adjudicating authority rejected the rebate claims of the petitioners by seeking to distinguish the above referred decision of this court and by relying upon a clarification issued by the Central Board of Excise and Customs. Being aggrieved, the petitioners have filed the present petition.

6. Learned advocate for the petitioners, submitted that the impugned order passed by the adjudicating authority is ex-facie without jurisdiction. It was submitted that the authorities functioning under any enactment in the State of Gujarat are duty bound to follow the pronouncements of this court, under the circumstances, there can be no question of the Assistant Commissioner of Central excise seeking to distinguish any pronouncement of this court. It was submitted that when the issue is, thus, settled by a direct decision of this court, it was not open to the adjudicating authority to disallow the rebate claim of the petitioners. The attention of the court was invited to the decision of this court in the case of Zenith Spinners v. Union of India (supra), to point out that Notification No.10/2004-CE (NT)

dated 03.06.2004 has been struck down by this court as being ultra vires the Central Excise Rules, 2002 and hence, it was not permissible for the

adjudicating authority to rely upon the same. It was further pointed out that an appeal was preferred against the above referred decision of this court before the Supreme Court and the Supreme Court vide its order dated 28.08.2015 in the case of Union of India v. Zenith Spinners, 2015 (326) ELT 23 (SC), had not interfered with the said order. The attention of the court was invited to the findings recorded by the adjudicating authority in paragraphs 8.5 to 8.7 of the impugned order, to point out that the adjudicating authority has sought to distinguish the above referred decision of this court in the light of the decision of the Supreme Court, and submitted that in view of the fact that the Supreme Court has upheld the decision of this court, the question of distinguishing the decision of this court did not arise. It was, accordingly, urged that the impugned order being contrary to the law laid down by this court, deserves to be quashed and set aside.

7. On the other hand, Mr. Ankit Shah, learned Senior Standing Counsel for the respondents relied upon the reasoning adopted by the adjudicating authority in the impugned order and submitted that the same is just, legal and proper, and that there is no warrant for interference by this court.

8. The short question that arises in the present case is as to whether the impugned order passed by the adjudicating authority

is contrary to the decision of this court in the case of Zenith Spinners v. Union of India (supra). If that be so, it was not permissible for the adjudicating authority to take a view different from that was taken by the jurisdictional High Court in the said decision.

9. As can be seen from the impugned order, the above referred decision of this court was brought to the notice of the adjudicating authority, who thereafter has relied upon the decision of the Supreme Court dated 28.08.2015 in the case of Union of India v. Zenith Spinners (supra) and has observed that the decision of this court is applicable to the period prior to the issuance of the Notification No.10/2004 dated 02.06.2004, whereas in the facts of the present case, the rebate claims are after the applicability of the Notification No.10/2004 dated 02.06.2004 and hence, the same is not applicable to the present case.

10. A perusal of the decision of this court in the case of Zenith Spinners v. Union of India (supra) clearly shows that the same does not in any manner say that the same would be applicable only to the retrospective applicability of the notification. In the said decision, the court has held that the impugned notification being Notification No.10/2004/C.E.(N.T.) dated 3 June, 2004 is bad in law for the reasons

recorded in the order, namely, that it is not in consonance with the principal provisions, namely, rules 18 and 19 of the rules, and that it is, even otherwise, revenue neutral. The court held that the Central Board of Excise and

Customs cannot exercise powers under rule 19 of the rules to negate a

notification issued by the Central Government under rule 18 of the rules and has, accordingly, declared the same to be bad in law and quashed and set aside the same. Therefore, it is the entire notification which has been set aside and not merely the retrospective applicability thereof.

11. A perusal of the order dated 28.08.2015 of the Supreme Court reveals that before the Supreme Court, on behalf of the respondents, a submission was made that in any case, the said notification would apply prospectively and that the Central Board of Excise and Customs had thereafter issued circular clarifying that the said notification would apply prospectively. That Court observed that most of the demand in that case pertained to the period prior to the issuance of the said notification, and that on that ground itself, the show cause notice pertaining to that period would be bad in law. The court further observed that as the subject matter had become almost tax neutral, it was not necessary to entertain the appeal. Significantly, the court while entertaining the appeal, has not interfered with the decision of this court whereby the entire notification has been set aside.

12. In *Zenith Spinners v. Union of India* (supra) this court held thus:

"10. Rule 18 of the Rules stipulates that where any goods are exported the exporter becomes entitled to rebate of duty which may be granted by way of a notification issued by the Central Government. The rebate is of duty paid on final products or duty paid on inputs used in the manufacture or processing of such final products viz. The goods which are exported. The notification is to contain such conditions or limitations and prescribe such procedure, upon fulfillment of which, the rebate shall be granted. Thus, on a plain reading Rule 18 provides a complete code by itself in relation to rebate of duty that an exporter can claim on export of goods.

11. Rule 19 of the Rules provides under Sub-rule (1) that an exporter may export final products which are liable to excise duty without payment of duty with the approval of the Commissioner. Sub-rule (2) of Rule 19 of the Rules makes a similar provision in relation to inputs which are used in the manufacture or processing of final products which are exported. While Sub-rule (3) of Rule 19 of the Rules stipulates that export under Sub-rule (1) or Sub-rule (2) is subject to the conditions, safeguards and procedure that may be specified by the CBEC by way of a notification.

12. Therefore, on a plain reading of both the Rules i.e. Rules 18 and 19 it is apparent that the said Rules operate in separate fields. Rule 18 of the Rules comes into play only in relation to the final products or the inputs which are not only liable to duty but on which duty has been paid. The said Rule viz. Rule 18 of the Rules, cannot be invoked in case of either final products or inputs on which no duty is paid even though the goods are liable to duty. The insistence of the respondent authorities, in the circumstances, that in a case where an exporter exercises option under Page 0035 Sub-rule (2) of Rule 19 of the Rules

in relation to inputs, which may be duty free, or which are removed without payment of duty on execution of bond, when used for the purposes of manufacture or processing of final products which are exported, the exporter must export the goods only under Rule 19(1) of the Rules is not borne out by the provisions of the Rules.

13. In a case where the final product itself is liable to duty and the exporter, on clearance of such goods for export, makes a claim for rebate on payment of duty at the

time of clearance, cannot be prevented from doing so on the specious plea that the inputs used in manufacture of such final products were procured without payment of duty. There is no rationale for such course of action apart from the fact that, as stated hereinbefore, the relevant Rules do not envisage any such requirement. Xxxxx

14. There is one more reason. As can be seen from reading of Sub-rule (1) and Rule (2) of Rule 19 of the Rules the opening portion grants an option to the exporter by virtue of the language used. In Sub-rule (1) it is stated any excisable goods may be exported, and in Sub-rule (2) it is stated any material may be removed. Therefore, the exporter has an option to export the final products without payment of duty or use inputs which are procured without payment of duty in the manufacture or processing of goods which are to be exported. At the other end, the later portion of Sub-rules (1) and (2) of Rule 19 of the Rules grants discretion to the Commissioner to approve the option that is exercised by an exporter by use of the phrase as may be approved. If the interpretation which is placed on the provision by the respondent authorities by issuance of impugned Notification is accepted, it would not only take away the option granted to the exporter but also take away the discretion granted to the Commissioner by the Rule. It is settled position that by virtue of exercise of powers of issuing a notification which is for the purposes of imposing conditions, safeguards and procedure the authority cannot exceed the jurisdiction by providing for a situation which either restricts the rights granted under the Rule itself or make the Rule itself redundant.

15. It is not disputed that the original notification issued by CBEC under Sub-rule (3) of Rule 19 of the Rules on 26th June, 2001 and made effective from 1st July, 2001 has been operating without any difficulty and nothing has been brought on record to show why the impugned amendment became necessary. At the cost of repetition it requires to be stated that nothing has been brought on record nor has the learned counsel been in a position to point out as to how and in what circumstances an exporter can claim double benefit.

16. The matter may also be considered from another angle. The power to issue notification under Rule 18 of the Rules is available with the Central Government while power under Rule 19(3) of the Rules is available with the Page 36 CBEC. The Board is a creature of the statute and cannot go beyond the powers

granted under the statute. If the Central Government has, in its wisdom, provided for granting rebate upon fulfillment of certain conditions and subject to certain procedural safeguards, CBEC cannot be permitted to render the Notification issued by the Central Government redundant by issuing a notification in exercise of powers under Rule 19 of the Rules. Nor can CBEC exercise such powers so as to render Rule 18 otiose. Hence, for this reason also, the impugned Notification cannot be upheld."

"18. In the circumstances, the impugned Notification being Notification No. 10/2004- CE(NT) dated 3rd June, 2004 is bad in law for the aforesaid reasons, namely, it is not in consonance with the principal provisions, namely, Rules 18 and 19 of the Rules, and it is, even otherwise, Revenue neutral. The CBEC cannot exercise power under Rule 19 of the Rules to negate a notification issued by the Central Government under Rule 18 of the Rules. The same is, therefore, declared to be bad in law and is quashed and set aside. As a consequence the impugned show cause notices (Annexure-C Collectively) are also quashed and set aside."

13. The above referred decision would be squarely applicable to the facts of the present case, and the distinction sought to be drawn by the adjudicating authority is misconceived. This court having struck down Notification No.10/2004-CE(NT) dated 3 rd June, 2004 it was not permissible for the adjudicating authority to place reliance upon the same for

the purpose of denying the benefit of rebate to the petitioners. The impugned order being in direct conflict with the law laid down by the jurisdictional High Court, therefore, cannot be sustained. Since the rebate claims have been disallowed solely on the basis of Notification No.10/2004- CE(NT) dated 3 June, 2004, no useful purpose would be rd

served by remanding the matter to the adjudicating authority and the rebate claims deserve to be allowed.

14. For the foregoing reasons, the petition succeeds and is, accordingly, allowed. The impugned orders (i) Rebate/1543-1561/ Centurion/Div-I/16-17 dated 28.11.2016; (ii) Rebate/1584-1585/ Centurion/Div-I/16-17 dated 29.11.2016; (iii) Div-III/CE/175-179/Reb/16-17 dated 30.12.2016; (iv) Div-III/CE/125-127/ Reb/16-17 dated 18.12.2016; (v) Rebate/1898-1903/Centurion/Div- I/16-17 dated 12.01.2017 & (vi) Div-III/CE/198- 200/Reb/16-17 dated 15.02.2017, passed by the Assistant Commissioner, Vadodara (Annexure "K" to the petition), are hereby quashed and set aside and the rebate claims are hereby allowed. Rule is made absolute accordingly, with no order as to costs.