
(2009) 07 GUJ CK 0051
In the Gujarat High Court

Case No : CE-Customs Gold Controll Reference No's. 17 of 2000 and 4 of 2001

Comm. of Central Excise and Customs

APPELLANT

Vs

Gujarat Bottling Co. Ltd.

RESPONDENT

Date of Decision : 17-07-2009

Acts Referred:

Central Excise Rules, 1944 — Rule 173Q, 57A, 57B, 57G, 57I

Central Excises and Salt Act, 1944 — Section 11A, 35G

Constitution of India, 1950 — Article 14

Medicinal and Toilet Preparations (Excise Duties) Act, 1955 — Section 19(2), 3, 3(3)

Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 — Rule 12

Citation : (2009) 169 ECR 71 : (2010) 259 ELT 13

Hon'ble Judges : K.A. Puj, J;A.L. Dave, J

Bench : Division Bench

Advocate : Y.N. Ravani, for the Appellant; None, for the Respondent

Judgement

K.A. Puj, J.—At the instance of the Commissioner of Central Excise Ahmedabad, the Customs, Excise and Gold (Control) Appellate Tribunal, West Regional Bench at Mumbai, has referred to the following question of law for the opinion of this Court u/s 35G of the Central Excise Act, 1944:

Reference No. 17 of 2000

Whether the view of the Tribunal is correct in law that the credit of Modvat provided in Rule 57B in cases where the input is cleared in terms of notification granting partial exemption, based on the value of clearance i.e. notification 175/86 could be taken at a point in time later than credit of duty actually paid is taken?

Reference No. 4 of 2001

Whether the higher notional credit in terms of Rule 57B of the Central Excise Act, 1944 can be taken within a reasonable period i.e. six months from the date of receipt of the input and original date of credit taken?

Though the questions in both the references are differently worded, the controversy involved therein is same and hence, for the sake of convenience, both these references are heard and disposed of together. The facts are taken from reference No. 17 of 2000.

2. The respondent - assessee is engaged in the manufacture of aerated water and Maaza soft drink falling under Chapter 22 of the Schedule to the Central Excise Tariff Act, 1985 and is holding Central Excise License in Form L-4 bearing No. ADI/AW/2/70 and working under self removal procedure prescribed under Chapter No. VIIA of the Central Excise Rules, 1944.

3. The respondent Company is availing the benefit of credit of central excise duty on inputs used in the manufacture of Thums-up and utilising it to pay central excise duty leviable on Thums-up under Rule 57-A of the Rules. The Company vide its letter dated 14.11.1991 addressed to the Assistant Collector of Central Excise, Division III, Ahmedabad intimated that they have taken differential higher credit in BED amounting to Rs. 55,500.56/- in their RG23A Part II (Maza) on 18.09.1991 on inputs, namely, Crown corks received earlier in the factory stating that they failed to take the aforesaid credit due to their lack of knowledge of the correct applicable provision of the law. The excise department was of the view that the respondent Company has wrongly taken the aforesaid credit under Rule 57-B of the Rules as in absence of any specific provision under the Rule 57B, notional credit under Rule 57B at a later date than the receipt of inputs in the factory of the Modvat user cannot be allowed merely on the ground of lack of knowledge of the correct applicable provision of the Rules for the purpose of claiming Modvat credit under Rule 57B of the Rules. The Assistant Collector of Central Excise has, therefore, issued the show-cause notice on the respondent Company calling for their explanation as to why credit of central excise duty amounting to Rs. 55,500.56 in DEB taken in RG23A Part II (Maaza) on Thums-up in violation of Rule 57B, should not be disallowed and reversed under Rule 57I of the Rules and why penalty should not be imposed under Rule 173Q of the Rules.

4. The above show-cause notice was adjudicated and order was passed by the Assistant Collector, Central Excise, Division III, Ahmedabad on 09.06.1992. As a matter of fact, three different orders in Original bearing No. 45/1992, 46/1992 and 47/1992 were passed on the same day i.e 09.06.1992.

5. Being aggrieved by the said orders, the respondent - assessee preferred appeals before the Collector (Appeals), Central Excise and Customs, Ahmedabad who vide his order dated 15.10.1992 set aside the order in Original No. 45 of 1992 to the extent it disallows higher notional Modvat credit taken within a period of six months. He set aside the order in Original No. 46/1992 in toto and upheld the order in Original No. 47 of 1992 as regards disallowing higher notional Modvat credit and penalty of Rs. 1,000/- imposed in each of the three cases was waived.

6. Being aggrieved by the said order of the Collector of Central Excise and

customs, the Central Excise department preferred Second Appeal before the Tribunal and the Tribunal vide its order dated 30.05.1998 dismissed the said appeals following the decision in the case of Commissioner of Central Excise v. Mysore Lac & Paint Works 1991 (52) ELT 510 wherein the Tribunal held that Modvat credit once taken does not disentitle the assessee to take the additional credit if later it is found that credit was taken short. The Tribunal further observed in the said order that such subsequent taking of the additional higher notional credit should be taken within a reasonable time limit of six months.

7. Being aggrieved by the said order of the Tribunal, the Commissioner of Central Excise filed reference application and the Tribunal vide its order dated 17.09.1999 referred the above question of law for the opinion of this Court.

8. Mr. Y.N. Ravani, learned Central Government Counsel appearing for the revenue has submitted that there is no provision in Rule 57B which permits the assessee to claim Modvat credit at a later date. He further invited the Court's attention to the Board's letter dated 07.9.1988 on the basis of which show-cause notice was issued on the respondent - assessee. The issue was raised in RAC meeting (Hyderabad) on 12.12.1988 and the Chairman of the Central Board of Excise and Customs clarified that the law does not permit to claim credit at a later date, if not taken initially, in absence of any specific provisions under the Modvat Rules. He has, therefore, submitted that the assessee is not entitled to take credit at a later date. The respondent - assessee has made mistakes repeatedly even after benefit granted by Collector (Appeals) on similar issue. He has, therefore, submitted that the respondent - assessee should not be allowed to make mistakes of law repeatedly, when they know about the provisions of law very well.

9. Despite service of notice, nobody appears on behalf of the respondent.

10. Having gone through the orders passed by the authorities below, we are of the view that the Tribunal has merely followed the decision of the 1994 (74) ELT 902. The issue for consideration before the Tribunal was that the assessee having failed to take the Modvat credit on the specified date, took the credit at a later date on account of some clarification, subsequently issued. The objection was raised by the Central Excise department to the effect that the credit ought to have been taken on the date of receipt of the goods. The Tribunal, relied on the decision of the Special Bench in 1991 (33) ECR 329 wherein it was held that the Credit could be taken within a reasonable time after the receipt of the inputs and extended the same principle by further holding that considering the entire scheme of the Central Excise Act and allied matters, the period of six months was a reasonable period.

11. In 1998 (99) ELT 147 (Tribunal), the Tribunal has rejected the reference application filed by the Central Excise department on the ground that there is no bar expressly or impliedly provided for in any of the relevant Rules disentitling the party from availing of credit at a later date and this being the position, the

issue as formulated does not give any rise to an issue of law worth referring to the High Court.

12. A converse situation arose in the case of *Government of India Vs. Citedal Fine Pharmaceuticals, Madras and Others*, wherein a question of recovery of escaped duty without any prescribed period was involved. In that case, Rule 12 of the Medicinal Toilet Preparations (Excise Duties) Rules, 1956, provides for the recovery of duty, as well as any other sum payable to the Collecting Government under the Act, if the same is not paid on account of short levy or deficiency or for any reason. Rule 12, in substance, contains additional safeguard for recovery of duty, it does not create any additional charge or liability on manufacturer for the payment of the duty. The liability to pay tax is created by the charging Section 3 of the Act of 1955 and Rule 12 confers on the authorised Officer, a power to recover duty if the same has not been paid on account of any short levy or deficiency or any other reason. The said Rule is referable to Section 19(2)(i) of the Act. The Rule carries out the purposes of the Act as it seeks to provide for recovery of duty as contemplated by Section 3(3) of the Act. The Court, therefore, held that the High Court committed error in holding that Rule 12 provides for recovery of escaped duty although the Act is silent on question of escaped assessment and, therefore, it is ultra vires of the Act. The Court further held that the Rule 12 is not unreasonable and violative of Article 14 of the Constitution of India merely because it provides no period of limitation for recovery of duty escaped.

13. This Court has also taken similar view in the case of *Torrent Laboratories Pvt. Ltd. Vs. Union of India*, wherein it is held that recovery of credit wrongly availed of within reasonable period can certainly be effected, in absence of specific period of limitation. The Court further held that provisions of Section 11-A of the Central Excise and Salt Act, 1944 cannot be read into Rule 57I, special provision regarding recovery of Modvat Credit wrongly availed of to which the Legislature did not intend general provisions of Section 11A.

14. Based on the aforesaid judgments of the Tribunal as well as this Court and the Apex Court, the view of the department can hardly be sustained. Rule 57-B prescribes no time limit for claiming Modvat Credit. If it is not existed at the initial stage, there is no bar to claim such credit at subsequent stage. The only criteria which is laid down in the Rule is that it should not exceed 90% of the duty paid. An analogy can also be drawn from the provisions contained in Rule 57G of the Central Excise Rules which prescribes the time limit of six months. In any case, no prejudice is caused to the Central Government if the additional credit is allowed to be taken by the assessee. In the above view of the matter, the question referred to us is answered in affirmative i.e. in favour of the assessee and against the revenue.

15. Both the references are accordingly disposed of without any order as to costs.