(2009) 07 GUJ CK 0064

In the Gujarat High Court

Case No : CE-Customs Gold Controll Reference No. 2 of 1999

Commi. of Central Excise and Customs APPELLANT

Vs

Shree Pramukh Switchgear RESPONDENT

Date of Decision : 15-07-2009

Acts Referred:
Central Excise Rules, 1944 — Rule 52A, 57A
Central Excises and Salt Act, 1944 — Section 35G(1)

Citation : (2009) 170 ECR 87

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

Bench : Division Bench

Advocate : R.J. Oza, for the Appellant;

Judgement

K.A. Puj, J.—At the instance of the Commissioner of Central Excise, Ahmedabad following question of law has been referred by the

Customs, Excise Gold (Control) Appellate Tribunal West Regional Bench at Mumbai u/s 35G(1) of the Central Excise Act, 1944.

Whether modvat credit is admissible on the gate passes endorsed after 1.4.94 and whether the notification No. 16/94-CE/NT dtd 30.3.94 would

stand extended if the gate passes are issued prior to date specified in the said notification, but endorsed subsequently and whether such gate passes

could be recognized as proper duty paying documents?

2. The brief facts giving rise to the present reference are that the respondent in this case was availing of modvat credit under Rule 57-A of the

Central Excise Rules. The respondent was found to have taken the modvat credit on the strength of gate passes which were endorsed after

1.4.1994. The Assistant Commissioner of Central Excise, Ahmedabad therefore initiated proceedings by issuance of show cause notices dated

30.10.1994 and 5.1.1995 for wrong availment of modvat credit and has passed order in original dated 25.1.1996 confirming the demand of Rs.

17,238/- being the amount of credit taken on endorsed gate passes.

3. Being aggrieved by the said order of the Assistant Commissioner of Central Excise the respondent assessee preferred an Appeal which came to

be allowed by the Commissioner (Appeals) vide his order dated 7.7.1997. By allowing this Appeal the Commissioner (Appeals) followed the

decision of the Tribunal in the case of 1996 (64) ECR 1 25 (Tribunal) wherein the Tribunal has held that the date of issue of the gate passes is the

critical date, and if a gate pass has been issued earlier to 1.4.1994 the mere fact that it is endorsed at later date should not be a ground for denying

modvat credit.

4. Since the Central Excise Department has not accepted the above referred decision of the Tribunal the Commissioner of Central Excise has

preferred an Appeal before the Tribunal and the Tribunal after following its own earlier decision in the case of Moosa Haji Patrawala (P) Ltd. v.

Commissioner of Central Excise (Supra) and other decisions of the Tribunal dismissed the said Appeal filed by the Central Excise Department.

5. Being aggrieved by the said decision of the Tribunal, the Central Excise Department has preferred a reference application before the Tribunal

and the Tribunal vide its order dated 26.5.1998 referred to the above question of law for the opinion of this Court.

6. Mr.R.J.Oza, learned Senior Standing Counsel appearing for the Central Excise Department has submitted that though several decisions of the

Tribunal are in favour of the assessee there is a solitary decision of Madhya Pradesh High Court to his knowledge, which had decided the same

issue in favour of the Central Excise Department. He invited the Court''s attention to the decision of Madhya Pradesh High Court in the case of

Commissioner of Central Excise, Indore v. Shree Synthetics 2007 (207) E.L.T. 341 (M.P.) wherein while disagreeing with the view taken by the

Tribunal in the case of Moosa Haji Patrawala (P) Ltd. v. Commissioner of Central Excise (Supra) and 1998 (101) ELT 425 the High Court took

the view that it is apparent from the proviso to the Notification that in order that a person avails credit, he has to do so before 30.6.1994, on the

basis of the endorsed gate-passes/subsidiary gate passes/certificates issued before 1.4.1994. Under the Notification, therefore, no gate passes

could be issued after this date. The facility of endorsing gate passes co-existed with the gate pass, therefore, the endorsed gate pass in order to

derive benefit of this Notification could also have been issued only before 1.4.1994. Notification is to be strictly construed and when the language

is plain and unambiguous, it leaves no doubt that both the requirements are concurrent. The Court, therefore, took the view that the requirement

contemplated by the Notification is that gate pass should have been issued before 1.4.1994 and endorsement should also have been made before

that date. This twine requirement is to be completed before 1.4.1994 in order that a person avails credit before 30.6.1994. The Court, therefore,

answered both the questions in favour of the revenue and against the respondent.

7. Based on the aforesaid judgment of the Madhya Pradesh High Court Mr. Oza has strongly urged that the Tribunal has committed an error in

deciding the issue in favour of the respondent assessee and since the twine requirements of the proviso have not been fulfilled in the present case,

the decision taken by the Tribunal is required to be reversed and the question referred to this Court must be answered in the negative i.e. in favour

of the applicant - revenue and against the respondent assessee.

8. On behalf of the respondent - assessee nobody appears.

9. The controversy between the parties arose in the fact situation that the respondent - assessee has, inter alia, received goods on endorsed gate

passes on which the endorsement was made after 1.4.1994. Notification No. 16/94-CE(NT) dated 30.3.1994 prescribed certain documents valid

for the purpose of availing modvat credit. A list of such documents are mentioned in table (Sr. No. 1 to 13) to the said Notification. The validity is

subject to the condition that the documents mentioned therein were issued before 1.4.1994 and received in the factory alongwith the goods on or

before 30.6.1994. The endorsed gate passes are one of the documents prescribed at Sr. No. 10 of the table. The gate passes issued under Rule

52A have been prescribed separately under Sr. No. 12 of the table. It is, therefore, evident that the endorsed gate passes are also subject to the

aforesaid condition of the notification which means that the same will be valid document if issued before 1.4.1994 which in other words only means that the endorsement should have been made prior to 1.4.1994. The credit was regularized vide Notification No. 16/94-CE(NT) for the endorsed

gate passes which may have been issued and not reached the manufacturer and it did not mean continuation of endorsement of the gate passes

even after the invoice systems came into force. In view of this, the gate passes which have been endorsed after 1.4.1994 are not valid documents

for allowing modvat credit, as per the stand of the Central Excise Department.

10. While examining this issue the Bombay Tribunal in the case of Moosa Haji Patrawala (P) Ltd. v. Commissioner of Central Excise (Supra) took

the view that the Notification No. 16/1994 came into effect from 30.3.1994. The gate passes which are issued on or before 30.3.1994 are valid

documents. The endorsed gate passes are also specified against Serial No. 10 of the said Notification as authorized documents. But by a proviso

to the Notification, it is stipulated that the document specified in the table should have been issued before 1.4.1994 and credit should have been

taken on or before 30.6.1994. The department''s objection before the Bombay Tribunal was that since the endorsed gate passes have been issued

after 1.4.1994, the credit was not available. While overruling this objection the Tribunal held that, there was no dispute that the credit has been

taken on or before 30.6.1994. The objection, prima facie, was not sound because the endorsed gate pass is not comparable to the issue of gate

pass. What is mentioned in the proviso to Notification is that the document should have been issued. There is no dispute about the fact that gate

pass was issued on 30.3.1994 and not the endorsement. The endorsement is for the purpose of transferring the goods covered by the gate pass. It

is only an endorsement regarding transfer, on the gate pass already issued. The tribunal has further taken into consideration the fact that the

requirement of dealers getting registered and issuing invoice, which could be accepted as valid document, was stipulated under Notification No.

32/1994 dated 4.7.1994. The trader who has bought the goods against a gate pass issued on or before 30.3.1994 could not have issued an

invoice for purpose of modvat before the Notification No. 32/1994 could come into force. Hence, during the period from 1.4.1994 till the issue of

Notification No. 32/1994 dated 4.7.1994, even if the gate passes were issued on or before 30.3.1994, such gate passes would not be valid for the purpose of modvat credit in the case of receipt through a trader, if the view taken by the department is sustained. The Tribunal, therefore, took

the view that when the gate passes have already been issued on or before 30.3.1994 and the entire goods covered by gate pass are transferred by

way of sale under an endorsed gate pass and the credit is taken prior to 30.6.1994, no objection can be taken.

11. It appears to us that view taken by the Bombay Tribunal stands on a very sound footing. Though Madhya Pradesh High Court has referred to

decision of Bombay Tribunal in case of Moosa Haji Patrawala (P) Ltd. v. Commissioner of Central Excise (Supra), there was no discussion at all

on the reasoning adopted by the Bombay Tribunal. Even the effect of Notification No. 32/1994 dated 4.7.1994 was not considered by the

Madhya Pradesh High Court. With due respect to the learned Judges of the Madhya Pradesh High Court we are of the view that the High Court

has read something more which was not there in the proviso to Notification No. 16/94-CE(N.T.) dated 30.3.1994. The proviso simply states that

the documents have been issued before 1.4.1994 and the credit under the said rules has been taken on or before 30.6.1994. Proviso does not say

that the documents should have also been endorsed before 1.4.1994. Even otherwise, issuance of subsequent Notification No. 32/1994 dated

4.7.1994 makes it clear that the trader who has bought the goods against the gate pass issued on or before 30.3.1994 could not have issued a

invoice for the purpose of modvat credit before the Notification No. 32/1994 could come into force. It is settled legal position that one reads the

Notification as it is and nothing is to be added nor anything is to be subtracted. Entry No. 12 of the table refers to only gate passes issued under

Rule 52A, as it stood before 1.4.1994. It does not refer to endorsed gate passes, as it is reflected in Entry No. 10 of the table.

12. In view of the above discussion, we are of the view that, though we are in agreement with the findings arrived at by the Madhya Pradesh High

Court to the extent that the requirement contemplated by the Notification is that gate passes should have been issued before 1.4.1994, we are

however not endorsing the view that the endorsement of gate passes should have also been made before that date. The only requirement which is

to be completed before 1.4.1994 is that the gate passes have been issued before 1.4.1994 and the other requirement contemplated by the proviso is that the credit under the said rules has been taken on or before 30.6.1994. We, therefore, do not find any infirmity in the view taken by the

Tribunal. We accordingly answer the question referred to us in the affirmative i.e. in favour of respondent - assessee and against the applicant -

department.

13. This reference is accordingly disposed off without any order as to costs.

