(2010) 12 GUJ CK 0107

In the Gujarat High Court

Case No : Tax Appeal No. 975 of 2010

Commissioner APPELLANT

Vs

Suzlon Structures Ltd. RESPONDENT

Date of Decision : 09-12-2010

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35G
Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 — Rule 7, 7(1)

Citation : (2011) 264 ELT 329

Hon'ble Judges : Harsha Devani, J;H.B. Antani, J

Bench : Division Bench

Advocate : Kalpesh N. Shastri, for the Appellant; Navin K. Pahwa and Amit K. Dave, for the Respondent

Final Decision : Dismissed

Judgement

Harsha Devani, J.—In this appeal u/s 35G of the Central Excise Act, 1944 [the Act], the Commissioner, Central Excise and Customs, Rajkot has challenged the order dated 1st December 2009 passed by the Customs, Excise & Service Tax Appellate Tribunal, West Zonal Bench at Ahmedabad [the Tribunal] in Appeal No. E/793/09 [2010 (253) E.L.T. 93 (Tribunal)], proposing the following questions:

Whether Hon. Tribunal was correct in directing to condone the delay in filing the application for fixation of brand rate of drawback under Rule 7 of the said rules, in absence of "sufficient cause" and whether the Tribunal has the power to alter the time-limit specified in Rule 7 of the said rule?

2. The Respondent Company is engaged in the manufacture and export of Tubular Towers for Wind Operated Electricity Generators. The Respondent had filed six applications for fixation of brand rate of duty drawback under Rule 7(1) of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 [the Rules] on account of duty suffered on inputs used for manufacture of goods exported. There was delay in filing some applications and therefore, the Respondent filed an application for condonation of delay. The Commissioner of

Central Excise, Rajkot, vide Order-in-Original dated 16-2-2009 rejected the application of the Respondent for condonation of delay on the ground that the applications were beyond the period of limitation and that the Respondent had failed to prove that it was prevented by sufficient cause from making applications within time.

3. Aggrieved, the Respondent carried the matter in appeal before the Tribunal. The Tribunal, vide the impugned order, allowed the appeal, set aside the order passed by the Commissioner and remanded the matter with a direction to the Commissioner to consider the application for fixation of drawback by condoning the delay.

4. Mr. K.N. Shastri, learned Standing Counsel for the Appellant has vehemently assailed the impugned order of the Tribunal. Inviting attention to the findings recorded by the Tribunal, it was submitted that the Tribunal after recording a finding to the effect that "we find full justification in the decision taken by the Commissioner in refusal of condonation of delay", was thereafter not justified in taking a lenient view in the matter and directing the Commissioner to condone the delay that was occassioned in filing the application for fixation of brand rate of duty drawback. It was submitted that the Commissioner had found that all the applications for fixation of brand rate of duty drawback by the Respondent during the last two years were invariably delayed with the same set of reasons which cannot be termed as "sufficient cause". The Commissioner also was of the view that if delay was required to be condoned irrespective of sufficient cause, it would mean altering the time-limit of 60 days specified in Rule 7(1) of the Rules to 90 days and therefore, cannot be accepted. Learned Standing Counsel accordingly submitted that the appeal requires consideration and that the question as proposed or as may be deemed fit by the Court may be formulated.

5. Mr. Navin K. Pahwa, learned advocate appearing on caveat on behalf of the Respondent Company has invited attention to the reasonings adopted by the Tribunal while holding that a lenient view was required to be taken in the matter. Attention was also invited to the order of the Commissioner to point out that some applications were filed by the Respondent within the period of limitation; however, the Commissioner, without considering the said fact, had rejected all the applications irrespective of the fact as to whether the same were filed within the period of limitation or beyond the period of limitation. It was also pointed out that all the applications were filed within a period of 30 days during which it was permissible for the Commissioner to condone the delay in filing the applications. It was submitted that the Commissioner had brushed aside the applications of the Respondent on the ground that considerable part of the delay had been occasioned for the reason that EP copies of the shipping bills were released after 60 days whereas it is nowhere specified in the Rules that for submission of application for fixation of brand rate of duty draw back, EP copy of shipping bill should be furnished. The Commissioner further observed that as per Board''s Circular dated 6-3-2003, only photocopy of shipping bill was required to be

submitted and therefore the reason put forth by the Respondent that they did not get EP copy of the shipping bill in time is not relevant to the issue at hand and therefore not acceptable. Mr. Pahwa, referring to item No. 4 of the check list below Circular No. 14 -Customs/2003 dated 6th March 2003 issued by the Government of India, submitted that the Respondent was under the bona fide impression that EP copy was required to be submitted along with the application for fixation of brand rate of duty drawback. Attention of this Court is also drawn by the learned advocate for the Respondent to a circular dated 9th December 2003 issued by the Central Board of Excise and Customs, Government of India wherein it is stated that after taking into consideration the difficulties faced by exporters in filing applications for fixation of brand rate of duty drawback as there is delay in obtaining EP copies of the shipping bills, the Government had clarified that a liberal approach should be adopted in condoning the delay over and above the usual period of 60 days for filing application by manufacturer/ exporter for fixation of duty drawback rate. Mr. Pahwa submitted that considering the aforesaid circulars and after appreciating the material on record, the Tribunal found that a lenient view was required to be taken in the matter and therefore the Tribunal has passed the impugned order and the same requires no interference at the hands of this Court. He submitted that in any way, the Tribunal having exercised its discretion, it cannot be said that the order passed by the Tribunal is in any manner arbitrary and therefore also, he same requires no interference at the hands of this Court.

6. As can be seen from the impugned order of the Tribunal, it is true that, as contended by the learned Standing Counsel, the Tribunal has initially noted that there was full justification in the decision taken by the Commissioner in refusal of condonation of delay. However, the Tribunal thereafter considered the submission on behalf of the Respondent that the Respondent was under an impression that EP copy was required to be submitted along the application and because of this, the delay has occurred. The learned advocate appearing for the Respondent before the Tribunal also assured that such delay would not happen in future. The Tribunal, after taking into consideration the fact that exports are not growing as they were in the past and also considering the financial difficulty the exporter was passing through, found that a lenient view can be taken at this juncture.

Circular dated 9th December 2003 lays down thus:

3. In the interest of export promotion and as a measure facilitation to the exporters, the Ministry had never taken such a restrictive approach in condoning the delay of 30 days beyond the normal period of 60 days and the manufacturer/ exporter were permitted to file a simple request for such extension within the said time-limit of 60+30: 90 days. Any approach for not condoning the delay of 30 days beyond a period of 60 days may run contrary to the approach adopted earlier by the Ministry, and may result in tremendous resentment by the trade and industry and ultimately affect the exports. It is, therefore, suggested that a liberal approach be adopted to condone the delay of 30 days beyond the usual

period of 60 days for filing an application by manufacturer/exporter for fixation of duty drawback rate/amount in respect of the exports made by them under claim for drawback.

Thus, it appears that the Ministry, taking into consideration the difficulties faced by the exporters in obtaining EP copies of Shipping Bills has issued the above instructions requesting the concerned authorities to take a liberal approach to condone the delay of 30 days beyond the usual period of 60 days.

7. As is apparent from a plain reading of the circular, the circular had been occasioned in the light of difficulties faced by exporters in obtaining EP copies of shipping bills. Thus, the findings recorded by the Commissioner that the rules do not provide for furnishing EP copies of shipping bills along with the application for fixation of brand rate of drawback does not appear to be correct inasmuch as though the rules may not specifically provide for furnishing copies of EP shipping bills, it appears that under the checklist below circular dated 6th March 2003 referred to hereinabove, copies of EP shipping bills are required to be attached along with application for fixation of brand rate of drawback. Had it been otherwise, there would be no occasion for the Government to issue circular dated 9th December 2003 wherein after recording the fact that the Government has taken into consideration the difficulties faced by exporters, requested the concerned authorities to adopt a liberal approach in condoning the delay in filing application for fixation of brand rate of drawback. The circular would be binding on all the officers of the Government, and therefore, the Commissioner was not justified in brushing aside the same stating that the Ministry has not stated that delay should be condoned in all the cases irrespective of whether the case is covered by the criteria/yardstick given in the relevant legal provisions. While holding so, the Commissioner has failed to consider the fact that the said circular had been issued in the light of the fact that a copy of the EP shipping bill was required to be filed along with the application for fixation of brand rate of drawback. Thus, the Commissioner was not justified in rejecting the application on the ground that the Respondent has failed to prove that they were prevented by sufficient cause from making applications within the time-limit inasmuch as copies of shipping bills were not required to be filed along with the applications.

8. The Tribunal having taken into consideration the aforesaid facts as well as the spirit of the circular dated 9th March 2003, has passed the impugned order and it is not possible to say that the Tribunal has committed any legal error in condoning the delay that had occasioned in filing the application. In any case, the Tribunal has exercised its discretion and it being neither arbitrary nor unreasonable, the view adopted by the Tribunal does not warrant any interference.

9. In the light of the above discussion, in the light of the aforesaid discussion, it is not possible to state that there is any legal infirmity in the impugned order the Tribunal so as to warrant interference. The impugned order of the Tribunal does not give rise to any question of law as proposed or otherwise, much less, a

substantial question of law. The appeal is, accordingly, dismissed.

