(2011) 09 GUJ CK 0162

In the Gujarat High Court

Case No : Tax Appeal No. 1425 of 2006

Commissioner of C. EX. and Cus., Surat-II APPELLANT

Vs

Catalco Chemicals (P) Ltd. RESPONDENT

Date of Decision : 22-09-2011

Acts Referred:

Citation : (2012) 277 ELT 56 : (2013) 18 GSTR 534

Hon'ble Judges : S.G. Gokani, J;Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Gaurang H. Bhatt, for the Appellant; G.N. Shah and Ms. Minoo A. Shah, for the Respondent

Final Decision : Dismissed

Judgement

Akil Kureshi, J.—Revenue is in appeal against judgment of CESTAT dated 29-3-2006 [2006 (200) E.L.T. 469 (Tribunal)]. Following question has been presented for our consideration: Whether the Hon''ble CESTAT''s ruling that duty shall be discharged by the holding company and not by the actual manufacturer (i.e. subsidiary company) is tenable in law or not?

Briefly stated facts are as follows. Respondent is a manufacturer. The respondent received a show cause notice on 31-7-1997 from the department in which it was alleged that it had cleared goods valued at Rs. 1 crore 89 lakhs by availing SSI exemption under Notification No. 175/86, dated 1-3-1986 and Notification No. 1/93, dated 28-2-1993. The assessee was 100% subsidiary company of M/s. Catalyst (India) Pvt. Ltd. and was therefore, not entitled for SSI exemption under said notifications. It was further alleged that assessee had not disclosed these facts to the department and filed classification claiming SSI exemption under the above-mentioned notifications. The department therefore, proposed to recover excise duty of Rs. 19,10,000/- with interest and penalty.

2. The assessee opposed the show cause notice and raised several contentions including that the exemption was correctly claimed. Merely because the assessee

was subsidiary of M/s. Catalyst (India) Pvt. Ltd., would not disentitle the assessee from claiming such exemption.

3. The adjudicating authority however, repelled all the contentions of the assessee and passed an order directing recovery of excise duty with penalty and interest. The assessee carried the matter in appeal. The Appellate Commissioner rejected the assessee''s appeal whereupon the assessee preferred further appeal before the Tribunal. The Tribunal by impugned judgment reversed the orders passed by the Excise Authorities relying on decision of Bangalore Bench of the Tribunal in case of Nutrine Sweets Pvt. Ltd. v. Commissioner of Central Excise, Tirupathi reported in 2005 (192) E.L.T. 486 (Tri.-Bang.). The Tribunal noticed the decision of Apex Court in case of Collector of Central Excise, Bangalore v. Gammon Far Chems. Ltd. reported in 2003 (152) E.L.T. 28 (S.C.) and was of the opinion that the case of assessee was falling within the Notification No. 175/86 and Notification No. 1/93 whereas decision of the Apex Court was rendered in the background of Notification No. 85/85 dated 17-3-1985. It is this decision of the Tribunal that the Revenue has challenged before us.

4. Counsel for the Revenue vehemently contended that the Tribunal committed serious error. The respondent-assessee had not disclosed full facts before the Excise Authorities. The respondent-assessee was a subsidiary of M/s. Catalyst (India) Pvt. Ltd. The total production of both the Companies exceeded the monetary limits set out in Notification No. 175/86 and Notification No. 1/93. He further submitted that there was total mutuality of interest between the two Companies. Even on that count, the Tribunal committed error. Reliance was placed on decision of Apex Court in case of Gammon Far Chems Ltd. (supra). Our attention was also drawn to the decision of Tribunal in case of Gammon Far Chems Ltd. v. Collector of Central Excise, Bangalore reported in 1994 (71) E.L.T. 59 (Tribunal) which came to be upheld by the Apex Court in 2003 (152) E.L.T. 28 (S.C).

5. On the other hand, Ms. Shah counsel for the assessee opposed the appeal contending that the Tribunal has committed no error. Case of the present assessee was governed by SSI exemption Notification No. 175/86 and Notification No. 1/93. Decision of the Apex Court in case of Gammon Far Chems Ltd. (supra) was rendered in background of Notification No. 85/85. There was vital difference of language between two sets of notifications. She of course relied heavily on decision of Nutrine Sweets Pvt. Ltd. of the Bangalore Bench of the Tribunal. Out attention was also drawn to the decision of Apex Court in case of Commissioner of C. Ex., Jaipur v. Electro Mechanical Engg. Corpn, reported in 2008 (229) E.L.T. 321 (S.C.) wherein the aspect of clubbing of clearances of different units on basis of mutuality of interest or flow back of funds from one unit to another came up for consideration.

6. Having thus heard learned counsel for the parties, we record that undisputedly case of the present assessee was covered by SSI exemption Notification No. 175/86 and Notification No. 1/93 and not under Notification No. 85/85.

Notification No. 85/85 provided for exemption to small scale industries and assessee claiming benefit thereof should fulfill two conditions in negative form. In clause (2) of the said Notification, it is stated that:

(2) Nothing contained in this notification shall apply if the aggregate value of clearances of all excisable goods for home consumption -

(a) by or on behalf of a manufacturer, from one or more factories, or

(b) from any factory, by or on behalf of one or more manufacturers, had exceeded rupees seventy-five lakhs in the preceding financial year.

In comparison to above provisions made in Notification No. 85/85, Notification No. 175/86 provided the following negative conditions :

(3) Nothing contained in this notification shall apply if the aggregate value of clearances of all excisable goods for home consumption -

(a) by a manufacturer, from one or more factories, or

(b) from any factory, by one or more manufacturers,

had exceeded rupees one hundred and fifty lakhs in the preceding financial year."

Similarly, Notification No. 1/93 provided one of the following as negative condition :

(2) The aggregate value of clearances of the specified goods for home consumption in a financial year -

(a) by a manufacturer, from one or more factories, or

(b) from a factory, by one or more manufacturers,

(i) under sub-clause (a) of clause (1) and clause (2) of paragraph 1 taken together shall not exceed rupees thirty lakhs;

(ii) under sub-clauses (b) and (c) of clause (1) shall not exceed rupees twenty lakhs and twenty-five lakhs respectively; and

(iii) under clause (2), shall not exceed rupees ten lakhs.

7. Comparing in all three notifications, we find that in Notification No. 85/85, condition 2(a) reproduced here-in-above envisaged including in the assessee''s aggregate value of clearances all excisable goods for home consumption by or on behalf of a manufacturer. This concept of including aggregate value of clearances on behalf of manufacturer is not found in subsequent Notification No. 175/86 and Notification No. 1/93. It was in this background that the Bangalore Bench of the Tribunal in case of Nutrine Sweets Pvt. Ltd. (supra) was of the opinion that merely because a company is a subsidiary company of another, clearances by both companies cannot be clubbed for the purpose of ascertaining SSI limits. To our mind this was correct assessment of the position.

8. The Apex Court in case of Gammon Far Chems Ltd. (supra) interpreted the above-noted clause (2) of Notification No. 85/85 and upheld the Revenue''s stand with respect of clubbing of clearances by subsidiary with that of principal.

9. We may notice that even in absence of any clause as contained in Notification No. 85/85, if there was neutrality of interest between the two units, clubbing of clearances may still be open for the Revenue. In case of Electro Mechanical Engg. Corpn. (supra), the Apex Court in background of Notification No. 1/93 upheld the decision of the Tribunal which had come to factual finding that there was no evidence on record to prove that there was mutuality of business interest or there was flow-back of funds from one unit to another and that therefore, clubbing of clearances could not be done under Notification No. 1/93.

10. Upshot of the above discussion would be that as held by Bangalore Bench of the Tribunal in case of Nutrine Sweets Pvt. Ltd. (supra), since our case concerns Notification No. 175/86 and Notification No. 1/93, by mere fact that assessee was a subsidiary of another company, clubbing of clearances was not permissible. We hasten to add that such clubbing may still be open if the department had established that there was mutuality of interest or flow back of funds. However, in the present case even in show cause notice, no such allegations have been made. From the starting, entire case of department revolves around clubbing on account of assessee being a subsidiary of another company. In absence of any notice to the assessee, it would now not be open for the department to pursue such line of reasonings. In the result, Tax Appeal is dismissed.