
(2010) 12 GUJ CK 0191
In the Gujarat High Court
Case No : Tax Appeal No. 2460 of 2009

Commissioner of C. EX. and Cus., Vadodara-II	APPELLANT
Vs	
Orbit Fabrics Ltd.	RESPONDENT

Date of Decision : 09-12-2010

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35G

Citation : (2011) 264 ELT 53

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

Bench : Division Bench

Advocate : R.M. Chhaya, for the Appellant;

Final Decision : Dismissed

Judgement

Harsha Devani, J.—In this appeal u/s 35G of the Central Excise Act, 1944 (the Act), the appellant-Commissioner, Central Excise and Customs, Vadodara, has challenged the order dated 2nd July, 2009 (248) E.L.T. 359 (Tribunal) passed by the Customs, Excise and Service Tax Appellate Tribunal (the Tribunal), proposing the following two questions :

(i) Whether, in the facts and circumstances of the case, despite the clear cut suppression of facts on the part of the assessee in not mentioning the specific serial number and List Number applicable in the exemption Notification No. 21/2002-CUS., the CESTAT is right in holding that there is no suppression and allowing the appeal on grounds of limitation?

(ii) Whether, in the facts and circumstances of the case, the Hon'ble CESTAT is right in ignoring the undertaking dated 5-6-2003 given by the assessee at the time of clearance of their goods that "in case of any duty liable to be paid by them as an 100% EOU the same will be paid by them?

2. The respondent-assessee, a 100% Export Oriented Unit, debonded its imported capital goods after obtaining necessary permission from the Development Commissioner. At the time of debonding, two bills of entry, both

dated 2nd July, 2003 were filed by the assessee, one for payment of customs duty at the rate of 5% under the EPCG scheme and the other for payment of customs duty claiming concessional rate in terms of Notification No, 21/2002-Cus., dated 1st March, 2002. A show cause notice dated 19th September, 2007 came to be issued to the assessee in respect of bill of entry No. 1/2003-04 for recovery of unpaid additional customs duty to the tune of Rs. 21,39,320/- and special additional customs duty of Rs. 6,20,403/-, in all, Rs. 27,59,723/- along with penalty and interest. The notice came to be adjudicated vide order dated 15th May, 2008, whereby the duty demand came to be confirmed along with penalty and interest.

3. Being aggrieved, the assessee went in appeal before the Tribunal. Before the Tribunal the learned advocate for the assessee did not dispute the liability to pay the duty but contended that the show cause notice was barred by limitation. The Tribunal, by the impugned order, upheld the said contention of the assessee and set aside the order impugned before it and allowed the appeal on the ground of limitation.

4. Mr. R.M. Chhaya, learned Senior Standing Counsel invited the attention of the Court to the order made by the adjudicating authority, to submit that the elements of willful misstatement and suppression were clearly made out in the facts of the present case. It was submitted that in the bill No. 1/2003-04, the assessee mentioned the Notification No. 21/2002 -Cus., dated 1-3-2002 without mentioning the serial number of the said notification under which it was claiming exemption. It has also not mentioned the details of the additional duty/special additional duty applicable in the case of the Bill of Entry. As per serial No. 250 of the said notification, customs duty @ 5% plus additional duty was required to be paid and as per serial No. 251 of the said notification customs duty @ 5% was only required to be paid. Thus, by not mentioning the serial number of the notification, the assessee knowingly created a situation to mislead the concerned officers to believe that its entire assessment was to be done @ 5% of basic customs duty. It was submitted that in the circumstances, the adjudicating authority was justified in invoking the extended period of limitation and that the Tribunal was not justified in throwing the burden on the revenue by holding that the proper officer never pointed out that the countervailing duty or special additional duty was also required to be paid by the assessee. In support of his submissions, the learned counsel placed reliance upon the decision of the Supreme Court in the case of M/s. Motiram Tolaram and Another Vs. The Union of India and Another, and more particularly on the contents of paragraph 9 thereof, wherein, it has been held that when under the provision of the Excise Act, an assessee wants to claim benefit of an exemption notification, then, the onus is on him to prove and show that the conditions, if any, which are imposed by the exemption notification have been satisfied. Inviting attention to the impugned order of the Tribunal, it was submitted that the assessee had not disputed that it was required to pay duty, but had contested the same only on the ground that the same was barred by limitation. It was submitted that the

assessee having not disputed the liability to pay the amount, and having given an undertaking dated 5. 6. (sic) to the JAC that in case of any duty liable to be paid by it as a 100% EOU, the same will be paid by it, cannot now be permitted to renege from such undertaking and that the exchequer should not be deprived of the revenue on tile ground that the Assessing Officer had not properly pointed out the amount of duty which the assessee was liable to pay in accordance with law.

5. As can be seen from the impugned order of the Tribunal, on merits, the assessee has not disputed its liability to pay the duty before the Tribunal. The only contention advanced on behalf of the assessee was that the demand was barred by limitation inasmuch as the bills of entry which were filed on 2nd June, 2003 were duly assessed by the proper officer. It was submitted that, the allegation in the show cause notice about the suppression of correct serial number of the notification was not in accordance with settled law, inasmuch as the revenue was expected to know the correct rate of duty required to be paid and could not pass the burden to the assessee. It was submitted that the assessee, in accordance with its understanding, had claimed the benefit of Notification No. 21/2002-Cus. and paid duty after filing bill of entry. If other duties were required to be paid by it, the onus was upon the Customs Officers to adjudicate its duty liability in accordance with law at the time of assessment.

6. The Tribunal, after considering the submissions advanced on behalf of the assessee observed that the assessee had filed bill of entry which was assessed by the proper officer, who, never pointed out that the countervailing duty or special additional duty was also required to be paid by the assessee. The Tribunal was of the view that no objection having been raised at the time of assessment of the bill of entry, the assessee could not be saddled with any mala fide intention or suppression so as to justifiably invoke the longer period of limitation. According to the Tribunal, this was the case of mistake or lack of knowledge on the part of the assessee as also on the part of the Customs Officer assessing the bill of entry, in which case, the extended period of limitation was not available to the revenue.

7. The facts as emerging from the record of the case indicate that the assessee had filed the bill of entry No. OFL/Debonding/01/2003-04, calculating the Basic Customs Duty @ 5% amounting to Rs. 6,90,875/- on the capital goods availing exemption under Notification No. 21/2002 -CUS, dated 1-3-2002. The said bill of entry came to be assessed by the proper officer who at the relevant point of time, did not raise any objection or point out to the assessee that it was liable to pay countervailing duty or special additional duty. According to the adjudicating authority, the assessee had not mentioned the serial number and list number applicable for the removal of capital goods with deliberate intention to mislead the assessing officer regarding the rate of duty applicable. The aforesaid view of the Adjudicating Authority is fallacious, for the reason that in case the assessee had not indicated the serial number of the relevant notification, it was for the

concerned Assessing Officer to point out the same to the assessee and call upon it to state the proper facts. Without calling upon the assessee to state the serial number under which the goods would fall, and without pointing out any defect in the bill of entry filed by the assessee, the concerned officer had assessed the bill of entry and had not raised any demand of countervailing duty or special additional duty. The assessee had rightly or wrongly claimed liability to pay duty at a particular rate. At the time of assessing the bill of entry, it is for the concerned officer to ascertain the actual duty liability. Mere non-mentioning of the serial number under which the goods would fall cannot be equated with suppression, because it was for the concerned officer to even otherwise verify from the description of the goods as to under which item number the same would fall and assess the duty liability accordingly. The concerned officer having failed to do so, the onus cannot be thrown on the assessee.

8. In the aforesaid backdrop, it cannot be said that there was any wilful misstatement or suppression on the part of the assessee so as to invoke the extended period of limitation. The Tribunal, was therefore, justified in holding that the show cause notice was time-barred and that no case was made out for invoking the extended period of limitation.

9. For the foregoing reasons, there being no infirmity in the impugned order of the Tribunal, the same does not give rise to any question of law as proposed or otherwise, much less, a substantial question of law, so as to warrant interference. The appeal is accordingly dismissed.