
(2012) 07 GUJ CK 0002
In the Gujarat High Court
Case No : Tax Appeal No. 1297 of 2011

Commissioner of C. Ex. and Customs	APPELLANT
Vs	
Ferromatik Milacron India Ltd.	RESPONDENT

Date of Decision : 10-07-2012

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A(1), 35G, 35L(b), 35R
Customs Act, 1962 — Section 130E(b), 131BA
Finance Act, 1994 — Section 83

Citation : (2013) 31 STR 424

Hon'ble Judges : V.M. Sahai, J;N.V. Anjaria, J

Bench : Division Bench

Advocate : Y.N. Ravani, for the Appellant; Bharat T. Rao, for the Respondent

Final Decision : Dismissed

Judgement

V.M. Sahai, J.—This appeal has been admitted on the following substantial questions of law: Whether the Tribunal committed substantial error of law in holding that credit of service tax paid on services of Customs House Agent/port services is admissible to the manufacturers as "input service tax credit" by overlooking statutory provision of Rule 2(1) of Cenvat Credit Rules, 2004.

We have heard Mr. Y.N. Ravani, learned advocate for the appellant and Mr. B.T. Rao, learned advocate for the opponent. 2. The relevant facts involved in this appeal are that the respondent-assessee engaged in the manufacture of injection Moulding Machines and parts thereof, Extruders and parts thereof, blow Moulding Machines and parts thereof and holding Central Excise Registration No. AABCC0881DXM001, was found to have wrongly enjoyed the Cenvat credit. In the course of verification by the audit party, it was noticed that the said assessee had taken Cenvat credit of Service Tax in respect of Canteen Services, Air Tickets and CHA & Port services which was not admissible as the said services were not an input service for them as per Rule 3 of Cenvat Credit Rules, 2004 read with Rule 2(1)(ii) of the Cenvat Credit Rules, 2004. Therefore, the said assessee had

rendered themselves liable to penalty in terms of the provisions of Rule 15(3).

2.1 The assessee was given a show-cause notice dated 12-10-2009 and the said notice culminated into order of the Assistant Commissioner, Central Excise, and disallowed the Cenvet Credit of Rs. 5,01,561/- and ordered for recovery of the same u/s 11A(1). The Assistant Commissioner also imposed penalty of Rs. 4,000/- under Rule 15(3) of the Cenvat Credit Rules, 2004 and also ordered recovery of interest on the amount payable. The Commissioner (Appeals) by its order dated 21-7-2010 upheld the order of the Assistant Commissioner. The assessee approached the Custom Excise and Service Tax Appellate Tribunal, West Zonal Bench, Ahmedabad by preferring an appeal. That appeal came to be allowed by the Tribunal and order dated 28-11-2008 passed by the Commissioner (Appeals) was set aside. The present appeal u/s 35G of the Central Excise Act is directed against the said order of the Tribunal.

3. As in the present case, the subject matter involves refund claim of Rs. 5,01,561/- only, it would attract Excise Department's own Circular dated 20-10-2010 and revising Circular dated 17-8-2011. These circulars were produced before us in the hearing of Tax Appeal No. 1294 of 2011, which we have disposed of today, by learned advocate for the assessee in that appeal. We take notice of the said two circulars in the present appeal also and on that basis find it not necessary to go into merits of this appeal.

3.1 The Circular dated 20-10-2010 is extracted and reproduced hereinbelow:

F. No. 390/Misc./163/2010-JC Ministry of Finance Department of Revenue Central Board of Excise & Customs

New Delhi 20th October 2010

1. The National Litigation Policy formulated by the Government of India aims to reduce Government litigation so that the Government ceases to be a compulsive litigant. The purpose underlying this Policy is to ensure that valuable time of the Courts is spent in resolving pending cases and in bringing down the average pendency time in the Courts. To achieve this, the Government should become an "efficient" and "responsible" litigant.

2. It also states that appeals shall not be filed if the matter is covered by a series of judgments of the Tribunal and the High Courts which have held the field and have not been challenged in the Supreme Court. The Policy also lays down that no appeal shall be filed where the assessee has acted in accordance with the long standing practice and also merely because of change of opinion on the part of the jurisdictional officers.

3. The Hon''ble Bombay High Court in its order dated 21-6-2010 in the case of Commr. of Central Excise Vs. Techno Economic Services Pvt. Ltd., had desired that CBEC consider issuing circular, on the lines of circulars issued by the CBDT, so as to reduce litigations arising out of indirect tax litigations.

4. In respect of appeals filed in the Supreme Court, the proposals are examined by the Board before filing. The Civil Appeals on matters relating to valuation and classification are filed u/s 35L(b) of the Central Excise Act, 1944 and Section 130E(b) of the Customs Act, 1962. Such appeals are being filed after careful scrutiny by the Board and while examining, the amount involved is kept in mind. On all issues other than those relating to valuation and classification, SLPs are filed by the Board after obtaining the opinion of the Id. Law officer from the Ministry of Law. However, it may be mentioned that Board has issued instruction vide DO F. No. 390/170/92-JC dated 13-1-93 as modified by D.O. of even number dated 27-10-1993 advising the field formations that appeals should not be filed in the Supreme Court in cases where the duty involved is Rs. 5 lakhs or less. The said instruction was issued in the light of observation of the Supreme Court as conveyed by the then Id. Attorney General and was reiterated vide various Circulars issued by the Board from time to time. It is, therefore, desired that the above instruction must be kept in mind while sending proposals to the Board for filing civil appeal or SLP in the Supreme Court.

5. The Board has decided that appeals in the Tribunal shall not be filed where the duty involved or the total revenue including fine and penalty is Rs. 1 lakh and below. Similarly in the case of High Courts appeal should not be filed in cases where the duty involved or total revenue including fine or penalty is Rs. 2 lakhs and below. While deciding the thresholds mentioned above, the duty involved shall be the decisive element. For example, in a case involving duty of Rs. 1 lakh with mandatory penalty of Rs. 1 lakh besides any other penalty imposed under the relevant provisions of Law, no appeal shall henceforth be filed in the Tribunal as the duty involved is within the monetary limit of Rs. 1 Lakh. Similarly, if the duty involved in a case is Rs. 2 Lakhs with equal mandatory penalty and any other penalty imposed under the Law in force at the relevant time, no appeal shall be filed before the High Court.

6. Adverse judgments relating to the following should be contested irrespective of the amount involved:

(a) Where the constitutional validity of the provisions of an Act or Rule is under challenge.

(b) Where notification/instruction/order or Circular has been held illegal or ultra vires.

(c) Where audit objection on the issue involved in a case has been accepted by the Department.

7. It may also be noted that, wherever it is decided not to file appeal in pursuance of these instructions, which are aimed solely at reducing government litigation, such cases shall not have any precedent value. In such cases, Commissioners should specifically record that "even though the decision is not acceptable, appeal is not being filed as the amount involved is less than the monetary limit prescribed by the Board." Further in such cases, there will be no

presumption that the Department has acquiesced in the decision on the dispute issues in the case of same assessee or in case of any other assessees, if the amount involved exceeds the monetary limits. Thus, in case any prior order is being cited on facts and law, it must be checked whether such order(s) were accepted only on account of the monetary limit before following them in the name of judicial discipline.

8. In respect of an order where it is decided not to file appeal in pursuance of these instructions, a data base needs to be created so that all the Commissionerates are made aware of the orders that are accepted solely on the ground that the revenue involved is below the threshold prescribed herein and which should not be taken as having precedent value. The details of such orders in respect of CESTAT and the High Courts is required to be furnished by the Zonal Chief Commissioners in Proforma enclosed (Annexure III E & Annexure III F) which should form part of the Monthly Technical Report being sent to the Directorate of Legal Affairs for posting on the departmental website. These Annexures III E dla-revonic.in.

9. The above instructions of the Board must be adhere to strictly for all appeals filed on or after 1-11-2010.

10. Instruction issued vide F. No. 275/55/CX.8A, dated 10-11-2008 is hereby rescinded.

11. Hindi version follows.

3.2 Similarly it is useful to extract fully also the subsequent Circular No. 390/Misc./163/2010-JC dated 17-8-2011 as below:

Department of Revenue Central Board of Excise & Customs

New Delhi 17th August 2011

INSTRUCTION

Sub:- Reduction of Government litigation - Providing monetary limits for filing appeals by the Department before CESTAT/High Courts and Supreme Court - Regarding.

1. In exercise of the powers conferred by Section 35R of the Central Excise Act, 1944 made applicable to Service Tax vide Section 83 of the Finance Act, 1994 and Section 131BA of the Customs Act, 1962 the Central Board of Excise & Customs (hereinafter referred to as the Board) fixes the following monetary limits below which appeal shall not be filed in the Tribunal, High Court and the Supreme Court.

2. For ascertaining whether a matter would be covered within or without the aforementioned limits the determinative element would be duty/tax under dispute. To illustrate it further in a case involving duty of Rs. 5 lakhs or below with equal penalty and interest, as the case may be, no appeal shall be filed in

the Tribunal. Similarly, no appeal shall be filed in the High Courts if the duty involved does not exceed Rs. 10 lakhs with or without penalty and interest. Further, the Commissionerates shall not send proposal to the Board for filing Civil Appeal or SLP in the Supreme Court in a case involving duty upto Rs. 25 lakhs, whether with penalty and interest or otherwise. However, where the imposition of penalty is the subject matter of dispute and the said penalty exceeds the limit prescribed, then the matter could be litigated further. Similarly, where the subject matter of dispute is the demand of interest and the amount of interest exceeds the prescribed limit, then the matter may require further litigation.

3. Adverse judgments relating to the following should be contested irrespective of the amount involved:

(a) Whether the Constitutional validity of the provisions of an Act or Rule is under challenge?

(b) Where Notification/instruction/order or Circular has been held illegal or ultra vires?

4. Several queries connected with application of monetary limits have been raised by the field formations which were considered by the Board and are being clarified as below:--

5. The revised monetary limits shall come into force from 1-9-2011.

6. This instruction is in continuation of earlier instruction of even number dated 20-10-2010 and seeks to revise the monetary limits, exclusion clauses and clarifies the doubts raised by the field formations on this issue.

4. In the above view of the matter, we are of the opinion that learned counsel for the appellant ought to have brought to the notice of this Court the circular dated 17-8-2011 and, if this circular had been brought to the notice of this Court, the appeal would not have been admitted.

4.1 In our opinion, since in the instant appeal the amount involved is Rs. 5,01,561/- only, in view of the circular dated 20-10-2010, the appeal could not have been preferred by the Central Excise and Customs Department before this Court. As recorded by us in our Order in Tax Appeal No. 1294 of 2011, on being informed from the side of the Department after Circular dated 17-8-2011 no other circular has been issued by the Ministry of Finance, Department of Revenue, Central Board of Excise and Customs, Government of India, New Delhi, authorizing the Department to file appeals where the amount is less than Rs. 10 lacs. It cannot be gainsaid that the Department is bound by its own circulars. Though the appeal has been admitted, we did not go into the substantial question of law formulated by this Court.

For the aforesaid reasons, this appeal is dismissed keeping the questions open to be decided in an appropriate case.