(2010) 05 GUJ CK 0044

In the Gujarat High Court

Case No : Tax Appeal No''s. 1361 and 1364 of 2009

Commissioner of C. Ex. and Customs APPELLANT

Vs

MTZ Polyfilms Limited RESPONDENT

Date of Decision : 06-05-2010

Acts Referred:
Central Excises and Salt Act, 1944 — Section 11A

Citation : (2010) 256 ELT 539

Hon'ble Judges : H.N. Devani, J;D.A. Mehta, J

Bench : Division Bench

Advocate : R.J. Oza, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

D.A. Mehta, J.—Both these appeals are taken up for hearing together as they arise out of a consolidated order of Tribunal dated 5th January, 2009. Appellant Revenue has proposed the following two questions in both the tax appeals:

(A) Whether in the facts and circumstances of the case, the Tribunal has committed substantial error of law in holding that there was no mala fide intention on the part of the assessee to avail inadmissible credit and, therefore, the Department cannot invoke extended period of limitation under proviso to Section 11A of the Central Excise Act, 1944?

(B) Whether in the facts and circumstances of the case, the Tribunal has committed substantial error of law by setting aside order of the adjudicating authority on limitation, even though duty of customs were exempted by Notification No. 34/97-Cus. and read with Exim Policy for 2002-07 which categorically disallowed Cenvat Credit of additional customs duty paid through debit from DEPB?

2. Respondent assessee in Tax Appeal No. 1361 of 2009 is a limited company while respondent assessee in Tax Appeal No. 1364 of 2009 is an employee of the limited company. The case of appellant-revenue is that respondent assessee,

namely the limited company who is manufacturing Polyester Films, has wrongly availed of Cenvat credit by making payment of countervailing duty by debiting DEPB passbook instead of making payment in cash for the period April, 2003 to April, 2005. Therefore, according to appellant, Cenvat credit amounting to Rs. 62,71,210/- was wrongly availed of by the limited company and accordingly equal amount of penalty and interest were also levied. A penalty of Rs. 10 lakhs was levied on the employee. The case of the appellant-revenue is that the wrong availment of Cenvat credit by making payment by debiting DEPB passbook was with an intention to evade duty and, in support thereof, learned Counsel for the appellant read extensively from paragraph No. 23 of the order-in-original to point out how there was suppression of facts. This submission was made in the context of the finding recorded by the Tribunal that extended period of limitation was not available to revenue considering that there were different views prevalent on the issue of availability of credit during the relevant period. Learned Counsel emphasized the fact that but for the investigation carried out by revenue, such wrong availment of credit would not have come to light. Attention was also invited to paragraph Nos. 24 and 25 to submit that for invoking larger period there was clear suppression of facts on part of the assessee and assessee having pressed into service Tribunal''s decision in case of M/s. Polyhose at the time of making the claim ought to have thereafter come voluntarily to surrender the same on the basis of Tribunal''s decision rendered by larger bench in case of 2004 (97) ECC 753

3. The Tribunal while passing the impugned order has referred to the fact that on merits, the issue stands concluded against the assessee by virtue of the larger bench decision of Tribunal in case of M/s. Essar Steel Limited. However, Tribunal has referred to another decision of Tribunal in case of 2008 (132) ECC 264 to come to the conclusion that there was a legal debate involved in the issue during the relevant period and, therefore, larger period could not be invoked. It is true that, as contended by learned Counsel for the appellant, in the facts of the present case, revenue had categorically recorded a finding as to suppression in the order-in-original but ultimately what is to be examined is whether in fact there is any suppression. This would be primarily a question depending upon facts and circumstances of each case. When one goes through the order-in-original, it becomes clear that in paragraph No. 3 of the said order, the basis for making the claim by the assessee has been recorded by the adjudicating authority. The said basis appears to be Notification No. 454/2002-Cus., dated 22nd April, 2002. The adjudicating authority has recorded "Under the said Notification, the duties of Customs including CVD was paid by the assessee by debiting DEPB passbook." Therefore, it is apparent that for the period between April, 2003 to April, 2005, the claim made by the assessee was based on a Notification and the assessee was entitled to hold a bona fide belief as to entitlement. Admittedly before the larger bench judgment in case of Essar Steel Limited was delivered by the Tribunal on 16th August, 2004, there was an order of the Tribunal in the case of 2003 (107) ECR 1 45 in favour of the assessee. This

fact has been accepted even by the adjudicating authority as noted in paragraph No. 20 of the order-in-original.

4. In the aforesaid factual matrix, it is not possible to state that the impugned order of Tribunal suffers from any legal infirmity so as to warrant interference. Accordingly, in absence of any substantial question of law, both the appeals are dismissed.

