(2010) 06 GUJ CK 0027

In the Gujarat High Court

Case No : Tax Appeal No. 1125 of 2009 and Civil Application No. 272 of 2009

Commissioner of C. Ex. and Customs — APPELLANT

Vs

Parle Products Pvt. Ltd. — RESPONDENT

Date of Decision : 30-06-2010

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

Citation : (2010) 258 ELT 485 : (2010) 35 VST 437

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

Bench : Division Bench

Advocate : Kalpesh N. Shastri, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

D.A. Mehta, J.—The Appellant Revenue has proposed the following two questions stated to arise out of order dated 7-11-2008 [2009 (237) E.L.T. 579 (Tri. - Ahmd.)] made by Customs, Excise And Service Tax Appellate Tribunal (the Tribunal) in the backdrop of following facts:

(1) Whether the Tribunal has committed an error in granting refund though condition mentioned under Notification No. 39/2001-C.E., dated 31-7-2001 for utilization of CENVAT credit of payment of service tax were not complied?

(2) Whether the Tribunal committed an error in treating the show cause notice as barred u/s 11A of Central Excise Act, 1944 though the order of jurisdictional Assistant Commissioner was dated 30-6-2006 and Show Cause Notice was issued on 23-8-2006, i.e. within prescribed period of limitation of one year?

2. The Respondent Assessee, a manufacturer of biscuits and corrugated boxes has a factory in Kutch district and is availing the benefit of Notification No. 39/2001-CE dated 31-7-2001. Under the Notification a manufacturer is entitled to the benefit of refund of amount paid in cash towards excise duty liability subject to the manufacturer discharging the liability towards excise duty firstly from the CENVAT Credit Account and only after exhausting the same making

payment in cash. For seeking refund the Notification lays down two procedures : One in which the manufacturer takes self credit for the duty paid in cash and the other where the manufacturer makes an application for refund. In the present case the Respondent Assessee opted for the self credit procedure whereby before 7th of the immediately succeeding month, a statement as to the details of duty paid in cash and the credit taken has to be forwarded to the Jurisdictional Assistant Commissioner or Deputy Commissioner. The said authority is required to determine the correct amount of refund available to the Assessee manufacturer and intimate the same by 15th of the next month. In a case where excess credit is taken by the manufacturer, the same has to be reversed within a period of five days from the date of receipt of the intimation from the Jurisdictional Commissioner. The self credit taken by the manufacturer is available for utilization towards payment of duty in the subsequent months to the extent of requirement to pay the duty in cash.

3. During the months of May, 2005, July, 2005 and September to December, 2005, a sum of Rs. 20,19,827/- was utilized from the CENVAT Credit Account of the Assessee towards payment of service tax on GTA service availed by the Assessee. Subsequently the Assessee realized the error for having utilized the CENVAT credit for payment of service tax and hence, on 4-4-2006 deposited the entire amount of service tax to the tune of Rs. 21,63,090/- with Rs. 43,243/- towards Education Cess for the said period and sent intimation to the department.

4. On 23-8-2006 six Show Cause Notices were issued on the ground that self credit of Rs. 20,19,827/- for the aforesaid period was irregular since CENVAT Credit to the said extent was not fully utilized for payment of excise duty in terms of the Notification. After adjudication demand has been raised for the said amount which has been challenged by way of Appeal before the Tribunal.

5. The Tribunal by a majority opinion has come to the conclusion that the demand for months of May and July, 2005 is beyond the period of limitation and in so far as the demand for the remaining period is concerned, Revenue has no right to seek payment of the said amount by treating the same as excess refund. On behalf of the Appellant Revenue it was submitted that the CENVAT Credit could have been utilized by the Assessee only towards payment of excise duty liability on the final product for seeking benefit under the Notification and could not have been utilized for payment of service tax. That having utilized the CENVAT Credit to the extent of Rs. 20,19,827/- for payment of service tax and taking self credit therefore was bad in law. Learned Counsel submitted that though it was a procedural lapse yet once there was breach of the relevant condition of the Notification the Assessee was required to make payment of the amount which had been taken as refund by the Assessee on the basis of the self credit.

6. It is not in dispute that the Assessee had in its CENVAT Credit account total credit of Rs. 2.7 crores out of which amount of Rs. 20,19,827/- was utilized for payment of service tax. It is also not the case of the revenue that the central

excise duty liability which was required to be discharged had not been discharged because the amount had been utilized for payment of service tax. The Tribunal has found as a matter of fact that service tax was paid by the Assessee not only from CENVAT credit account but subsequently also from PLA account with interest.

7. It is also an accepted fact that in so far as payment of Central Excise Duty, even in terms of the Notification, has been made and there is no default. Therefore, it is incorrect to state that there is breach of any condition so far as Notification is concerned. It is not as if the amount which was payable towards Central Excise Duty has been diverted towards payment of service tax. At the cost of repetition it is required to be recorded that a far larger sum was available in the CENVAT credit account, the amount of service tax which was paid was Rs. 20,19,827/- against total credit in the CENVAT credit account to the tune of Rs. 2.7 crores. Thus no prejudice is shown to have been caused to the revenue in any manner whatsoever.

8. In these circumstances, the impugned order made by the Tribunal which is primarily based on facts and evidence on record, does not warrant interference in absence of any legal infirmity. Accordingly, in absence of any substantial question of law, more particularly when revenue is not affected in any manner whatsoever, the Appeal is dismissed.

Civil Application No. 272 of 2009

9. In light of the order made in the Appeal the Civil Application has been rendered infructuous and stands rejected accordingly.