(2010) 12 GUJ CK 0002

In the Gujarat High Court

Case No : Tax Appeal No. 2157 of 2009

Commissioner of C. Ex. and Customs — APPELLANT

Vs

Sweet Industries — RESPONDENT

Date of Decision : 01-12-2010

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 11AB, 11AC, 35G
CENVAT (Credit) Rules, 2002 — Rule 12, 13(2)

Citation : (2011) 264 ELT 349

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

Bench : Division Bench

Advocate : Naynaben K. Gadhvi, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

Harsha Devani, J.—Leave to add substantial questions of law as proposed vide the amendment.

2. In this appeal u/s 35G of the Central Excise Act, 1944 (the Act), the Commissioner, Central Excise & Customs, Vapi has challenged the order dated 13-8-2008 2008 (134) ECC 163 made by the Customs, Excise & Service Tax Appellate Tribunal (the Tribunal), proposing the following three questions:

(1) Whether or not the CESTAT is right in holding that M/s. Sweet Industries, Daman is not required to pay any interest on CENVAT Credit availed on input/raw material destroyed in the fire accident & on CENVAT Credit availed on input/raw material contained in the semi-finished goods destroyed in the fire accident?

(2) Whether the Tribunal committed error in interpreting the provisions of Section 11AB of the Central Excise Act and by further holding that Section 11AB of the Act does not apply in case of delay in reversal of wrongly availed CENVAT Credit?

(3) Whether the Tribunal committed error in not appreciating aspect that CENVAT

Credit wrongly not reversed for long time is liable for interest?

3. The Respondent-Assessee is engaged in the manufacture of excisable goods. On account of a fire accident that took place on 26-1-2004 at the factory premises of the Assessee, all the stock of finished goods, semi-finished goods, raw material and capital goods/machinery were destroyed. Subsequently, a show cause notice came to be issued to the Assessee proposing to recover CENVAT Credit of Rs. 18,51,272/- availed on machinery/capital goods destroyed in the fire accident under Rule 12 of the CENVAT Credit Rules, 2002 (the Rules) read with Section 11A of the Act, along with interest u/s 11AB of the Act; demand of interest on delayed payment of duty on finished goods/raw material/raw material contained in semi-finished goods destroyed in the fire accident u/s 11AB of the Act; demand of interest of Rs. 58,435/- on delayed payment of CENVAT Credit amounting to Rs. 6,38,393/- u/s 11AB of the Act in terms of Rule 12 of the Rules as well as imposition of penalty under Rule 13(2) of the Rules read with Section 11AC of the Act.

4. The show cause notice culminated into an order made by the adjudicating authority whereby the adjudicating authority dropped the demand for recovery of CENVAT Credit of Rs. 18,51,272/-. However, he directed recovery of interest at appropriate rate u/s 11AB of the Act on delayed payment of duty on finished goods, CENVAT Credit availed on raw material destroyed in the fire accident and semi-finished goods destroyed in the fire accident, and confirmed the demand of interest of Rs. 58,435/-.

5. The Assessee carried the matter in appeal before the Commissioner (Appeals) who vide the order dated 28-9-2006, dismissed the appeal. The Commissioner (Appeals) found that there was delay in payment of duty on the part of the Assessee. Accordingly, interest at appropriate rate u/s 11AB of the Act was recoverable from it. Being aggrieved, the Assessee took the matter in second appeal before the Tribunal and succeeded.

6. Ms. Naynaben Gadhvi, learned Standing Counsel for the Appellant-revenue submitted that though the Assessee had reversed the CENVAT Credit availed on raw material as well as on raw material contained in semi-finished goods which were destroyed in the fire accident, the payment of duty and reversal of CENVAT Credit was not made in time as per the provisions of the, Act and the Rules made thereunder. In view of the delay, the Assessee was liable to pay interest on the delayed payment of duty or delayed reversal of CENVAT Credit u/s 11AB of the Act. Attention was invited to the impugned order of the Tribunal to submit that the Tribunal has held that Section 11AB of the Act would be applicable only in cases of non-levy or short levy of excise duty or nonpayment of duty by the due date as required under law and that Section 11AB of the Act would not be applicable in the facts of the present case.

7. Inviting attention to Rule 12 of the Rules, it was submitted that the Tribunal has lost sight of the said rule which provides that where CENVAT Credit has been

taken or utilized wrongly or has been erroneously refunded, the same along with interest shall be recovered from the manufacturer and the provisions of Sections 11A and 11AB of the Act shall apply mutatis mutandis for effecting such recoveries. It was submitted that the provisions of Section 11AB of the Act would, therefore, also be applicable in case where the CENVAT Credit has been taken or utilized wrongly or has been erroneously refunded and as such the view taken by the Tribunal is erroneous and warrants interference.

8. As can be seen from the impugned order of the Tribunal, before the Tribunal, on behalf of the Assessee, interest liability on finished goods had been admitted. Insofar as the interest on the CENVAT Credit of Rs. 1,25,844/- reversed by the Assessee on inputs contained in semi-finished goods destroyed in fire, it was submitted that in the light of the decision of the Larger Bench of the Tribunal in the case of Grasim Industries v. Commissioner of Central Excise & Customs, Indore, (2007 (208) E.L.T. 336 (Tribunal - LB)) the Assessee was not even required to reverse the credit taken on inputs contained in semi-finished goods destroyed in the fire since the requirement of CENVAT Credit Rules that the inputs should have been used in manufacture, had been fulfilled. It was submitted that, therefore, the demand of interest would not arise. The Tribunal after considering various submissions advanced on behalf of the Assessee, has held as follows:

(4) After considering the submissions of both the sides, I find considerable force in the arguments advanced by the ld. Advocate on behalf of the Appellants. In view of the Larger Bench decision in the case of M/s. Grasim Industries cited above, there is no liability of interest on Rs. 1,25,844/- CENVAT Credit reversed by them since the inputs have been issued for manufacture and were contained in semi-finished goods and there is no dispute on this aspect. As regards interest on CENVAT Credit of Rs. 19,06,198/- on the inputs lying as such and destroyed in fire accident, in view of the fact that Section 11AB applied to only in cases or non-levy or short levy of excise duty or non-payment of duty by the due date as required under law, Section 11AB is clearly not applicable. I also find that interest is not demand-able under any of the provisions available and relevant to the facts of the case. Therefore, the demand of interest on this amount also cannot be upheld. Coming to the CENVAT Credit of Rs. 6,38,393/- taken on capital goods, in view of the fact that the credit was not at all utilized as mentioned in the appeal memo submitted by the Appellants, and in view of the decisions of the Tribunal cited above that interest is not payable if the credit has not been utilized, the demand for interest on this amount also has to be set aside. I am not going into the merits of other contentions since the benefit of non-levy of interest on this ground alone is sufficient.

9. Thus, insofar as the demand confirmed by the adjudicating authority on the interest on delayed payment of duty on finished goods is concerned, the Assessee had accepted the liability. As regards the interest of CENVAT Credit reversed by the Assessee on inputs which had been used for manufacture and

were contained in semi-finished goods, in the light of the decision of the Larger Bench of the Tribunal in the case of Grasim Industries (supra), the Assessee was not even required to reverse the credit taken on the inputs contained in semi-finished goods destroyed in the fire. In the circumstances, when the Assessee was not even required to reverse the credit taken on the inputs contained in the semi-finished goods, the question of paying interest on late reversal of credit taken would not arise.

10. Insofar as the recovery of interest on the amount of CENVAT Credit of Rs. 19,06,198/- reversed by the Assessee lying as such, the Tribunal has held that the provisions of Section 11AB of the Act would not be applicable inasmuch as the said provision can be invoked only in cases of non-levy or short-levy of excise duty or non-payment of duty by due date as required under law. In this regard, it is clarified that this Court does not agree with the reasoning adopted by the Tribunal. The learned Counsel for the revenue appears to be justified in contending that while holding so, the Tribunal has failed to consider the provisions of Rule 12 of the Rules, which lays down that the provisions of Section 11A and 11AB of the Act shall apply mutatis mutandis for effecting such recoveries where CENVAT Credit has been taken or utilized wrongly or has been erroneously refunded. However, for the reasons that follow, the Court is not inclined to interfere with the impugned order of the Tribunal.

11. Rule 12 of the Rules provides that where CENVAT Credit has been taken or utilized wrongly or has been erroneously refunded, the same along with interest shall be recovered from the manufacturer and the provisions of Sections 11A and 11AB of the Act shall apply mutatis mutandis for effecting such recoveries.

12. In the facts of the present case, the Assessee had availed of CENVAT Credit to the extent of 50% of the CENVAT Credit in respect of the capital goods availed by it after the fire accident. Since, the Assessee was not entitled to avail CENVAT Credit after the accident, it was held that the Assessee was liable to pay interest of Rs. 58,435/- under Rule 12 of the Rules read with Section 11B of the Act for taking undue and illegal financial benefit in the form of wrong availment and wrong utilization of the credit. In this regard, before the Tribunal, on behalf of the Assessee, it had been pointed out that though CENVAT Credit of Rs. 6,38,393/- had been availed by the Assessee in April 2004, the credit taken was never utilized till the date of reversal and as such, there was no liability to pay interest. The Tribunal has held that in view of the fact that the credit was not at all utilized, in the light of the earlier decisions of the Tribunal; the Assessee was not liable to pay interest if the credit had not been utilized. The aforesaid view of the Tribunal is in line with the view taken by the apex court in the case of Commissioner of Central Excise, Mumbai-I Vs. Bombay Dyeing and Mfg. Co. Ltd., wherein the Assessee therein had reversed the entry before utilization, it was held that the same amounts to not taking credit.

13. In the circumstances, the Assessee having reversed the credit taken by it prior to utilization the same would amount to not taking credit and as such the

question of liability to pay any interest thereon would not arise. The Tribunal was, therefore, justified in holding that the Assessee was not liable to pay interest thereon.

14. In the light of the aforesaid discussion, though the Court is not in agreement with the reasoning adopted by the Tribunal as regards the applicability of the provisions of Section 11AB of the Act, for the reasons aforesaid, the Court does not find any reason to interfere with the impugned order of the Tribunal. In the circumstances, in the absence of any question of law, much less, a substantial question of law, the appeal is dismissed.