

(2012) 07 GUJ CK 0051
In the Gujarat High Court
Case No : Tax Appeal No. 424 of 2010

Commissioner of Central Excise and Customs, Ahmedabad-III APPELLANT
Vs
Fine Care Bio Systems RESPONDENT

Date of Decision : 30-07-2012

Acts Referred:

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

Citation : (2012) 37 STT 223

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

Bench : Division Bench

Advocate : Y.N. Ravani, for the Appellant; A.P. Nainawati, for the Respondent

Final Decision : Dismissed

Judgement

N.V. Anjaria, J.—The present Tax Appeal is directed against order dated 14.07.2009 of the Custom, Excise and Service Tax Appellate Tribunal, West Zonal Branch, Ahmedabad, rejecting the appeal of the Revenue. The issue involved was in respect of refund of Rs. 60,774/- of accumulated CENVAT credit claimed by the respondent assessee under Rule 5 of the CENVAT Credit Rules, 2004. The justifiability of that claim was sought to be questioned by issuing show cause notice 14.06.2007, which culminated into the order of rejection by the adjudicating authority. The issue was agitated in the appellate forums, and in the second round of the proceedings, the Tribunal ruled in favour of the assessee confirming the order of the Appellate Commissioner. That has brought the Revenue before this Court by way of present appeal.

1.1 By order dated 25.02.2010, the Court formulated following two questions for considerations.

(i) Whether Honourable CESTAT has committed an error in interpreting Rule 5 of Cenvat Credit Rules along with Sub Rule 2(1) pertaining to definition of "input service" while interpreting words "used in manufacture" by treating various

maintenance services as service "used in manufacture"?

(ii) Whether Honourable CESTAT has committed an error in ignoring Notification No. 5/2006-CE (NT) dated 14.3.2006 stipulating that refund of Cenvat credit is allowed only in respect of input or input service used in the manufacture of final product, which is cleared for export?

2. We heard learned advocate Mr. Y.N. Ravani for the appellant and Mr. A.R. Nainavati for the respondent.

3. Learned advocate for the respondent produced and drew our attention to the two circulars dated 20.10.2010 and a revising circular dated 17.08.2011 issued by the Central Excise Department. The said circulars inter alia provide monetary limit for filing appeal before the High Court. In circular dated 20.10.2010, limit of Rs. 2 lacs has been fixed providing that in the case where duty and the amount of penalty involved is below that limit, the Department would not file the appeal. That limit came to be enhanced to Rs. 10 lacs in the subsequent circular dated 17.08.2011.

3.1 On the above basis, we are dissuaded from going into the merits of the appeal and from considering the questions formulated as above, having regard to the fact that the amount involved in the appeal is Rs. 60,774/-.

3.2 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 cases 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 CCE v. Techno Economic Services Pvt. Ltd. 2010 (255) ELT 526 (Bombay) 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 Ld. 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 Ld 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 assesses, 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-rev@nic.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/CX8A dated 10.11.2008 is hereby rescinded.

11. Hindi version follows.

3.3 Similarly it is useful also to extract fully also the subsequent Circular No. 390/ Misc./163/2010-JC dated 17.08.2011 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:

3.4 We take notice of the above circulars. We were informed further that no other circular has been issued by the Ministry of Finance, Department of Revenue, Central Board of Excise & Customs, authorizing the Department to file appeal where the amount is less than Rs. 10 lacs.

3.5 Learned advocate for the appellant was not in position to dispute the instructions of the aforementioned circulars and the monetary limit prescribed therein. While it is true that the present appeal was filed and notice was issued prior to the circular dated 20.10.2010, when it comes up for consideration and hearing before us, the contents of the circular and the limits prescribed therein apply. In that light, it is not being disputed that the issues involved and the questions formulated in this appeal need not be decided.

4. It cannot be gainsaid that the Department is bound by its own circulars and the instructions thereof.

5. In above view of the matter, though the questions are formulated, we did not go into them and did not consider the merits of the appeal. This appeal is accordingly dismissed, without going into and expressing on merits, keeping the questions formulated open to be decided in an appropriate case.