
(2011) 09 GUJ CK 0094
In the Gujarat High Court
Case No : Tax Appeal No. 1805 of 2009

Commissioner of Central Excise and Customs

APPELLANT

Vs

NBM Industries

RESPONDENT

Date of Decision : 08-09-2011

Acts Referred:

CENVAT (Credit) Rules, 2004 — Rule 5
Special Economic Zones Act, 2005 — Section 2
Special Economic Zones Rules, 2006 — Rule 30

Citation : (2012) 276 ELT 9 : (2013) 29 STR 208

Hon'ble Judges : S.G. Gokani, J; Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Kalpesh N. Shastri, for the Appellant; Paresh V. Sheth, for the Respondent

Final Decision : Allowed

Judgement

Akil Kureshi, J.—Revenue is in appeal against the judgment of the Tribunal dated 6th March 2009 [2009 (246) E.L.T. 252 (Tribunal)] raising following questions for our consideration :

(i) Whether the Tribunal was right in allowing refund of the Cenvat credit availed on inputs used in the manufacture of goods cleared by DTA unit to a 100% Export Oriented Unit, following CT-3/ARE-3 procedure, where the provisions of Rule 5 of the Cenvat Credit Rules, 2004 are not applicable, such clearance being "deemed export"?

(ii) Whether the Tribunal was right in allowing refund of the Cenvat credit availed on inputs used in the manufacture of goods cleared by DTA unit to a 100% Export Oriented Unit, even in absence of enabling provision that consider deemed export as physical export as in case of supply to SEZ, having been defined as export in terms of Section 2(m), of SEZ Act, 2005 read with Rule 30 of the SEZ Rules, 2006?

2. From the questions it can be seen that though two questions are framed, issue is common, viz. entitlement of the manufacturer to refund of Cenvat credit on inputs used in manufacture of goods cleared by DTA units to 100% export oriented unit. Case of the Revenue is that such refund is not available since Rule 5 of the Cenvat Credit Rules does not cover such a situation granting benefit of deemed export. It is Revenue's case that only physical export would qualify for refund. We need not record the submissions at length since we find that similar issue was considered by a Division Bench of this Court in Tax Appeal No. 968 of 2008 Commr. of Central Excise Vs. Shilpa Copper Wire Industries, . One of the questions posed before the Court was as follows :

(i) Whether in the facts and circumstances of the case, the Tribunal is justified and has committed a substantial error of law in dismissing the appeal of the Revenue and confirming the order of the learned Commissioner (Appeals) holding that the clearances made by one 100% EOU to another 100% EOU which are "deemed exports" are to be treated as physical exports for the purpose of entitling refund of unutilized Cenvat credit contemplated under the provisions of Rule 5 of the Cenvat Credit Rule, 2004?

3. The Division Bench after taking into account the detail submissions of the counsel appearing for the parties held and observed as under :

14. We have heard the learned Counsel appearing for the parties and after considering their submissions, we are of the view that the issue raised by the Revenue in the present Tax Appeal is squarely covered by the decision of Amitex Silk Mills Pvt. Ltd. (supra), Commissioner of Central Excise v. Ginni International Ltd. and Sanghi Textiles Ltd. v. Commissioner of Customs & Central Excise 2006 (206) E.L.T. 854 (Tri.-Bang.). So far as the decision of the Tribunal in the case of Amitex Silk Mills Pvt. Ltd. (supra) is concerned, it is true that the appeal is admitted by the Apex Court, however, no stay was granted by the Apex Court. It is, however, more important to note that the decision of the Tribunal in the case of Ginni International Ltd. (supra) was also challenged before the Apex Court and the Apex Court vide decision reported in 2007 (215) E.L.T. A102 (S.C.) held while dismissing the Revenue's appeal against the Tribunal's order, that once Development Commissioner giving permission to the appellant, a 100% EOU, to sell goods in DTA up to a specified value, Revenue cannot go beyond the permission and dispute it holding that for fixing the limit only physical exports and not deemed exports should have been taken into account. It is also important to note that the decision of the Tribunal in the case of Sanghi Textiles Ltd. v. Commissioner of Customs & Central Excise (supra) was also challenged by the Revenue before the Apex Court and the Apex Court vide order dated 16-8-2007 dismissed the Revenue's appeal. While dismissing the said appeal, Apex Court has referred to its decision in the case of Ginni International Ltd. (supra) and reiterated that the Tribunal in its impugned order had held that once Development Commissioner giving permission to the appellant, a 100% EOU, to sell goods in DTA up to a specified value, Revenue cannot go beyond the

permission and dispute it holding that for fixing the limit only physical exports and not deemed exports should have been taken into account.

15. In view of the above settled legal position and considering the fact that the issue is settled by the Apex Court by those very judgments on which the Tribunal has placed reliance while deciding the case of the present respondent, we are of the view that no purpose will be served in keeping this matter pending, awaiting the out come of the Apex Court's decision in the case of Amitex Silk Mills Pvt. Ltd. (supra), especially when in two other matters, the Apex Court has already dismissed the appeals filed by the Revenue.

16. In the above fact situation, we are of the view that no question of law much less any substantial question of law, arises out of the order of the Tribunal and even if it arises, the answer is very obvious and we, therefore, hold that the Tribunal is justified and has not committed any substantial error of law in dismissing the appeal of the Revenue and confirming the order of the learned Commissioner (Appeals) holding that the clearances made by one 100% EOU to another 100% EOU which are "deemed exports" are to be treated as physical exports for the purpose of entitling refund of unutilized Cenvat credit contemplated under the provisions of Rule 5 of the Cenvat Credit Rule, 2004.

4. Counsel for the Revenue, however, submitted that a Division Bench of the Madras High Court in the case reported in 2007 (211) E.L.T. 23 (Mad.) has taken a different view. We find that the decision of this Court being directly on the issue, we are bound by the said decision. Further we find that the Apex Court in the case of Virlon Textile Mills Ltd. Vs. Commissioner of Central Excise, Mumbai, , though not in identical situation while examining the nature of DTA sales to 100% export oriented units observed that DTA sales against foreign exchange or other supplies in India can be equated with physical exports.

5. In the result, the situation being similar, this Tax Appeal is dismissed.