(2014) 02 RAJ CK 0205

In the Rajasthan High Court

Case No : Central Excise Appeal No. 18 of 2010

Commissioner of Central Excise — APPELLANT

Vs

Goyal Proteins Ltd. — RESPONDENT

Date of Decision : 11-02-2014

Acts Referred:
Central Excises and Salt Act, 1944 — Section 11A, 35G

Citation : (2014) 27 GSTR 205

Hon'ble Judges : J.K. Ranka, J;Ajay Rastogi, J

Bench : Division Bench

Advocate : Anil Mehta, Advocate for the Appellant; Ankit Totuka, Advocate for the Respondent

Judgement

Jainendra Kumar Ranka, J.—This Central excise appeal u/s 35G of the Central Excise Act, 1944 has been preferred by the appellant-Revenue assailing the order of the Customs, Excise and Service Tax Appellate Tribunal dated May 27, 2008 passed in Excise Appeal No. 1920 of 2006. The brief facts, which are necessary for disposal of the instant appeal, are that the respondent-assessee is a unit manufacturing refined vegetable oil through solvent extraction method. During this process, "de-oiled cake (DOC) and gum" are generated as a by-product. The process is that the oil seeds, viz., soyabean seeds and mustard are first cleaned and the foreign matters are removed by the passing through magnetic field. The cleaned seeds are cooked with steam and then crushed to form thin flakes. These flakes are again passed through the extruder/expander to make the flakes into collets. The collets are then conveyed to extractor and solvent hexane is sprayed on it in counter current direction. As hexane comes into contact with the meal, the oil get dissolved and separated out with solvent. The de-oiled meal containing about 30 per cent. solvent is sent to drying and toasting in desolventiser-cum-toaster. Dried and toastered meal is called de-oiled cake (DOC) which is ready for bagging and dispatch. The solvent containing oil is called micelle which is treated at various steps to recover solvent. Solvent free oil is called solvent extraction oil or crude oil. It is non-edible and sent to refinery for refining. Further refining of vegetable oil consists of number of steps called degumming, neutralisation, bleaching deodorization, etc. During the processes of degumming crude vegetable oil is treated with phosphoric acid at 60 degree centigrade and then fed to centrifuge machine to separate out the gummy matters. To neutralise the degummed oil it is then treated with caustic soda. The fatty acids present in the degummed oil reacts with caustic soda and gets separated as soap of heavier phase and oil is separated as lighter oil phase. These heavier soap phase and lighter oil phase are fed to the centrifuge continuously for separation. The soap phase is fed to acid oil section and reached with citric and phosphoric acid for recovery of by-product in neutral oil phase. The neutral oil obtained in this process of neutralisation is dried in vacuum drier for further processing. The colour of neutral oil is reduced up to consumer acceptable level in the process of bleaching, therein neutral oil is treated with bleaching earth and activated carbon and then filtered into clean clear bleach oil. The bleach oil has unpleasant odour which is not accepted for consumption. Therefore, in the process of deodorization the odoriferous material present in the oil is removed with steam distillation. The deodorized oil is cooled and filtered and the final oil is odourless tasteless and ready for packing.

2. It is claimed by the adjudicating authority that during the process of refining, the assessee is availing of Cenvat credit on number of inputs, namely, hexane, caustic soda phosphoric acid, etc., de-oiled cake (DOC) and gum manufactured in factories of solvent extraction industries is exempt from payment of the Central excise duty under Notification No. 115/1975-CE, dated April 30, 1975, the benefit of which the assessee is also claiming. However, the adjudicating authority was of the view that rule 6(2) of the erstwhile Cenvat Credit Rules, 2002 and rule 6(2) of the Cenvat Credit Rules, 2004 did not permit the assessee to avail of such input credit. It is the claim of the adjudicating authority that the assessee was manufacturing both dutiable as well as exempted goods but was not maintaining separate account for receipt, consumption and inventory of inputs meant for use in the manufacture of dutiable final products and the quantity of inputs intended for use in the manufacture of exempted goods. Accordingly, the adjudicating authority was of the opinion that under rule 6(3) of the Cenvat Credit Rules, 2002, they should have cleared the de-oiled cake and gum by reversing an amount equal to eight per cent of the price, and according to rule 6(3)(b) of the Cenvat Credit Rules, 2004 they should have cleared the de-oiled cake and gum by reversing an amount equal to ten per cent, of the price excluding sales tax and other taxes, if any, paid on the such goods from their Cenvat credit at the time of their clearance. It was the claim of the adjudicating authority that during the period from April 30, 2003 to September 9, 2004, the assessee had cleared 78,698.990 M.T. of de-oiled cake valued at Rs. 76,14,20,334 and 1.000 M.T. of gum valued Rs. 3,269 generated during the refining of crude vegetable oil without reversing an amount equal to eight per cent. of the price at the time of their clearance from the factory. The claim of the adjudicating authority was also that subsequently also, this happened under

different periods and accordingly, was of the view that the respondent-assessee had contravened the provisions of rules 4, 6, 8, 10 and 12 of the Central Excise Rules, 2002 and rule 6 of the erstwhile Cenvat Credit Rules, 2002 and rule 6 of the Cenvat Credit Rules, 2004. Accordingly, a show-cause notice was issued and it was observed in the show-cause notice that an amount of Rs. 8,84,29,478 was recoverable from the assessee in terms of rule 12 of the erstwhile Cenvat Credit Rules, 2002 and rule 14 of the Cenvat Credit Rules, 2004 read with section 11A of the Central Excise Act, 1944 and so also the interest. It was observed that the assessee had suppressed the figures of production, clearance and value of clearance of de-oiled cake (DOC) and gum in their monthly ER-1 returns and had also suppressed the fact that they had used Cenvatable inputs in the exempted goods.

3. Submission of the respondent-assessee was that the respondent-assessee had never produced two or more final products which would have necessitated the assessee to have maintained separate records for taking and utilising the Cenvat credit on the inputs used in or in relation to the manufacture of edible oil. It was also claimed by the respondent-assessee that the Government of India, Ministry of Finance repeatedly clarified under rule 57D, that the credit shall not be denied or varied on the inputs contained in waste, scrap, and/or in by-product even if such waste/scrap or by-product is exempted from payment of duty and/or is chargeable to nil rate of duty. It was also submitted by the respondent-assessee that the courts have decided number of cases holding that erstwhile rule 57CC of the Central Excise Rules, 1944 or rule 6 of the erstwhile Cenvat Credit Rules, 2002 do not come into play in case of waste, scrap, or by-product even if they are exempted or are chargeable to nil rate of duty. Explaining the process of manufacturing, it was also submitted that the respondent-assessee is not manufacturing two final products. The unintended/forced products, namely, de-oiled cake and gum/soap stock are by-products, though de-oiled cake/gums/ soap stock are capable of being sold and it fetches some price. However, in the instant case gums/soap stock is normally used for the further manufacture of acid oil but cannot be said to be the second/third final product for the purpose of rule 6 of the Cenvat Credit Rules, 2002. The assessee accordingly, relied upon the exemption Notification No. 115/1975-CE, dated April 30, 1975 and accordingly submitted that the assessee is not entitled to be levied the different duty.

4. However, the adjudicating authority was not satisfied with the explanation offered and vide order dated March 7, 2006 held the assessee liable to duty equal to 8 to 10 per cent. according to the datas for the period April 30, 2003 to November 30, 2004 and December 1, 2004 to February 28, 2005 and also imposed recovery to the extent of Rs. 8,84,29,478, the penalty under rule 13(2) was also levied. Further penalty of Rs. 40,00,000 was also imposed on the assessee under rule 25 of the Central Excise Rules, 2002. Interest was also directed to be levied accordingly.

5. Aggrieved by the order of the adjudicating authority, an appeal came to be preferred by the respondent-assessee before the Customs, Excise and Service Tax Appellate Tribunal. What was submitted before the adjudicating authority was reiterated before the Customs, Excise and Service Tax Appellate Tribunal and it was further submitted that the respondent-assessee had been filing monthly returns regularly showing clearance Of goods on payment of duty as well as exempted goods and, therefore, the allegation of suppression with an intend to evade payment of duty is not sustainable it was contended that the Revenue vide letter dated June 26, 2003, for the first time asked the respondent-assessee to pay Central excise duty at the rate of eight per cent. of the price of the exempted goods as per rule 6 of the Cenvat Credit Rules and by that time the Revenue was aware that the respondent-assessee was clearing goods manufactured of common inputs without payment of duty and therefore, was not justified and it was further submitted that they are ready to reverse whole of the credit availed of on common inputs and accordingly submitted that the claim of the respondent-assessee is proper and the appeal deserves to be allowed.

6. The Revenue reiterated what had been decided by the adjudicating authority in the adjudication order and the Revenue also relied upon the decision of the larger Bench of the Customs, Excise and Service Tax Appellate Tribunal in the case of 2007 (115) ECC 124 It was also submitted that reversing of the inputs credited now after so many years will not hold the case of the respondent-assessee as good.

7. The Tribunal, after considering the rival contentions, held that the Revenue was aware on June 26, 2003 that the respondent-assessee was taking credit in respect of common inputs and clearing products without payment of duty as well as on payment of duty and therefore, the charge of suppression of facts with intention to evade payment of duty is not sustainable. In so far as the earlier period is concerned, it was held that the dues beyond the normal period of limitation are time barred and accordingly set aside levy of duty and in so far as demand for remaining period is concerned, it was observed by the Customs, Excise and Service Tax Appellate Tribunal that when the assessee is ready to reverse whole of the credit availed of on common inputs and thereafter suo motu, reversed the credit and filed refund claim in respect of the duty under Notification No. 6/2006. In so far as the subsequent event is concerned, the Customs, Excise and Service Tax Appellate Tribunal accepted the contention of the respondent-assesses that they are willing to reverse whole of the credit availed of on common inputs used in manufacturing of the excisable as well as exempted goods and accordingly, remitted the matter to the adjudicating authority with a direction to accept the offer of the respondent-assessee to reverse the entire credit. This order of the Customs, Excise and Service Tax Appellate Tribunal is assailed before us by the appellant-Revenue.

8. Shri Anil Mehta, the learned counsel for the appellant-Revenue, submitted that the Customs, Excise and Service Tax Appellate Tribunal was unjustified in holding

in so far as the first period is concerned by holding that the Revenue was aware of taking credit in respect of common inputs and clearing products without payment of duty as well as on payment of duty and in this regard, he submitted that if the claim was not proper or not rightly claimed, mere acceptance of the claim by the Revenue authority was not sufficient. A claim, which is otherwise not tenable in law, even if accepted by the adjudicating authority, will not make the claim as allowable which on facts was disallowable. He further contended that as far as subsequent period is concerned, the claim of the respondent-assessee was not proper to have offered for reversing the inputs credit after so many years and he contended that it is only when the respondent-assessee was faced with this situation that he came out with this plea and had the respondent-assessee not been questioned, possibly, the claim, which was otherwise not allowable, would have gone unnoticed and therefore, observation of the Customs, Excise and Service Tax Appellate Tribunal to reverse the entire credit is not justified. He contended that substantial question of law arises out of the order of the Customs, Excise and Service Tax Appellate Tribunal and needs consideration by this court.

9. Per contra, Mr. Ankit Totuka, the learned counsel for the respondent-assessee, reiterated the arguments and further contended that all along the respondent-assessee had been furnishing regularly the monthly returns and had been giving in detail the modus operandi of the inputs created and that there was no suppression with intention to evade payment of duty when everything was crystal clear in the regular returns being filed. He also contended as far as the subsequent period is concerned, the claim was certainly allowable in view of the circular of the Central excise dated April 30, 1975. Nevertheless, despite of the circular, the respondent-assessee offered to reverse the inputs credited and there was nothing wrong in the same and the Customs, Excise and Service Tax Appellate Tribunal, after considering all the facts and circumstances, accepted the claim of the respondent-assessee. He contended that merely remanding the matter back to the Revenue with certain direction does not lead to any legal issue and no substantial question of law arise out of the order of the Customs, Excise and Service Tax Appellate Tribunal.

10. We have considered the arguments advanced by the learned counsel for the parties and also perused the impugned order.

11. It would be fruitful to quote the circular dated April 30, 1975 which provides as under:

"Notification No. 115/1975-CE, dated April 30, 1975

In exercise of the powers conferred by sub-rule (1) of rule 8 of the Central Excise Rules, 1944, the Central Government hereby exempts goods (other than rubberised coir mattresses, refined edible oil falling under Heading 15.02, fixed vegetable oils of Heading 15.03 and vegetable fats and oils of Heading 15.04) falling under the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), and manufactured in factories covered by any of the industries specified in the Schedule hereto annexed, from the whole of the duty of excise leviable thereon.

THE SCHEDULE

1. Coir industry.

2. Cashew industry.

3. Tanning industry.

4. Oil mill and solvent extraction industry.

5. Rice milling industry."

12. In our view, when the respondent-assessee had been furnishing regular returns on monthly basis disclosing therein about clearing goods manufactured out of common inputs without payment of duty as well as on payment of duty, then, there appears to be no suppression of facts with an intention to evade payment of duty. Therefore, we are of the view that the Customs, Excise and Service Tax Appellate Tribunal rightly considered that on June 26, 2003, it was first time that the Revenue made out a claim and therefore, when it was already aware of the past practice supported by the circular of the Board, therefore, in our view, there was no suppression of facts. Therefore, the Customs, Excise and Service Tax Appellate Tribunal was correct in holding that the demands beyond the normal period of limitation are time barred and therefore, correctly set aside the submission of the Revenue.

13. In so far as the subsequent period is concerned, in our view, the Customs, Excise and Service Tax Appellate Tribunal, after accepting the contention of the respondent-assessee, accepted the offer of the respondent-assessee that they would reverse the entire credit on the common inputs. The Gujarat High Court, in the case of The Commissioner of Central Excise Vs. Maize Products, , held that the directions issued by the Tribunal are merely in consonance with the requirement of the relevant rule, and it is not possible to state that the Tribunal has committed any error in issuing such directions. The assessee, having accepted before the Tribunal to reverse the Cenvat credit as recorded by the Tribunal as regards reversal of the amount involved under such a situation, the High Court held that when the matter has been remanded back to the adjudicating authority to redetermine the credit in accordance with law there was no substantial question of law and accordingly dismissed the appeal of the Revenue.

14. The Gujarat High Court, in the case of Commissioner of C. Ex. and Customs, vadodara-I Vs. Sterling Gelatin, held that under the scheme of Central Excise Act and Rules framed thereunder, credit of the duty paid on inputs used in the manufacturing of dutiable goods is given under the Cenvat Credit Rules so as to prevent the cascading effect of duty. Cenvat credit is availed of in respect of duty paid on the inputs used in the manufacture of final products. It further held that

the entire hydrochloric acid having been used for the manufacture of excisable goods being gelatin, the credit availed of in respect of the inputs would be duty recovered at the time of clearance of the excisable goods being gelatin. Accordingly, the Gujarat High Court observed that no question of law much less substantial question of law arise for consideration.

15. The Gujarat High Court, in the case of Commissioner of C. Ex., Ahmedabad-III Vs. Nirma Ltd., also held that even there was no question of maintaining separate accounts under such circumstances.

16. In view of the above facts and circumstances, in our view, the Customs, Excise and Service Tax Appellate Tribunal had correctly applied the provisions of law and in our view, it is a finding of fact and we do not find any illegality or perversity in the order impugned passed by the Customs, Excise and Service Tax Appellate Tribunal and there arise no question of law much less substantial question of law out of the order impugned passed by the Customs, Excise and Service Tax Appellate Tribunal so as to call for interference by this court. Consequently, the excise appeal, being devoid of merit, is here by dismissed. No costs.