(2016) 02 PAT CK 0140

In the Patna High Court

Case No : Miscellaneous Appeal No. 754 of 2010

Commissioner of Central Excise, Patna APPELLANT

Vs

Bata India Ltd. RESPONDENT

Date of Decision : 25-02-2016

Acts Referred:

Citation : (2016) 336 ELT 198

Hon'ble Judges : Ramesh Kumar Datta and Sudhir Singh, JJ.

Bench : Division Bench

Advocate : Mrs. Nivedita Nirvikar, Sr. SCCG, for the Appellant; D.V. Pathy and Mrs. Manju Jha, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Ramesh Kumar Datta, J.(Oral)—Heard learned counsel for the appellant and learned counsel for the Respondent.

2. The appeal has been filed against the order dated 16-12-2008 passed by the Customs, Excise & Service Tax Appellate Tribunal, Eastern Zonal Bench, Kolkata [2009 (238) E.L.T. 291 (Tribunal)] by which the appeal filed by the respondent was allowed permitting it to take the credit in the Cenvat account and utilise the same for payment of duty.

3. The respondent used to manufacture dutiable and exempted goods and had availed Modvat Credit in respect of inputs used. It was following the practise to debit the Modvatable credit every month in RG-23A Part-II register on pro-rata basis after taking into account the percentage of the value of dutiable footwear and exempted/export footwear cleared from the factory. The practise was being followed from 1-3-1987.

4. A show cause notice dated 8-1-1992 was issued by the Collector of Central Excise, Patna referring to the said practise being followed and the amount of credit taken under Rule 57A totalling to Rs. 86,09,189.97 resulting in short debit of Rs. 7,65,659.04 and asked as to why penalty should not be imposed upon it

under Rule 173C(bb) of the Rules for taking credit of duty which was not permissible to the respondent. The respondent filed reply to the show cause upon which the Collector, Central Excise, Patna passed his order dated 15-10-1992 confirming the demand raised by the show cause notice dated 8-1-1992 and also imposing penalty of Rs. 2,00,000/-. The respondent was also directed to submit a detailed chart of stock of inputs, etc.

5. The respondent aggrieved by the said order approached the Customs, Excise and Gold (Control) Appellate Tribunal, ERB, Kolkata which, by the order dated 20-4-1993 [1993 (67) E.L.T. 972 (Tribunal)], set aside the order of the Collector insofar as the duty and penalty was concerned and further directed the Collector to evolve a suitable method for estimating the quantum of credit to be expunged based on the inputs used and to take a final decision after additional data is made available by the respondent. The matter was again sent back to the Collector and thereafter to the Assistant Commissioner and was subjected to appeals repeatedly but nothing final could emerge for a substantial period of time. As would appear from the order of the Tribunal, the authorities of the Excise Department could not devise the proper procedure till 15-10-1993 upon which the respondent approached the authorities for allowing the utilisation of input credit balance lying with it but the respondent was denied of its claim by Departmental letter dated 15-10-1993 on the ground that it should halt till finalisation of procedure and such denial resulted in accumulation of input credit for which the respondent went on reminding the authorities by different letters requesting that a suitable procedure may be devised and a system may be finalised as early as possible so that the respondent may not be deprived of its legitimate claim.

6. It is also the admitted position that in the year 1994, the appellant utilised a sum of Rs. 46,29,977.97 out of the accumulated credit to discharge the duty liability claiming financial hardship, which was objected by the Department letter dated 28-11-1994 and the respondent was directed to deposit back the said amount under threat of penalty. Another letter dated 2-5-2006 was issued by the Assistant Commissioner again directing the respondent to reverse the credit, aggrieved by which the respondent filed an appeal before the Commissioner (Appeals) which was again disposed of by order dated 31-5-1996 remanding the matter to the Assistant Commissioner.

7. The dispute continued with several rounds of litigation between the respondent and the Department with regard to utilisation of the unutilized input credit amount and the determination of the mode and procedure in regard to determination of input credit, etc., during which there was status quo also as a result of which the respondent could not utilise the amount. The respondent again prayed before the authorities to decide the matter regarding the unutilized credit amount of Rs. 98,95,422.22 which was ultimately decided by order dated 12-1-2001 of the Deputy Commissioner directing the respondents to reverse the amount of Rs. 24,82,488. The respondent thereafter prayed for grant of refund

of unutilized balance amount of Rs. 74,12,954.22 after reversal of the said amount but that was also not allowed. Again on 6-2-2001 the respondent prayed for permission to allow transfer of unutilized credit to PLA since the refund had been denied. Upon refusal by the Department, a third round of litigation came before the Tribunal in Appeal No. E-194/2000, which was dismissed on 22-8-2001 [2003 (154) E.L.T. 591 (Tribunal)] by the Tribunal holding that the respondent not being aggrieved by the direction for reversal of Rs. 24,82,488/-, he may claim for refund of unutilized amount of credit for which the jurisdictional authority may be approached.

8. The dispute however, could not be resolved even after 4th round of litigation and then in the 5th round of litigation, the appeal filed by the respondent against the order dated 16-8-2005 passed by the appellant-authorities rejecting the claim of the respondent for refund of unutilized credit amount of Rs. 74,12,954.22, by the impugned order dated 16-12-2008 the Tribunal after noting the entire history of litigations during its various stages and noting the stand of the Revenue that the restraint imposed by the jurisdictional Superintendent was automatically withdrawn/lifted in view of the Deputy Commissioner?s order dated 12-1-2001, came to the conclusion that the Revenue could have very well resolved the matter in controversy as early as in 2002 without litigating the matter repeatedly. For the said reason, it held that the respondent had suffered on account of inaction of the Revenue and had earned input credit which remained disputed, for which he should not be made to suffer. Accordingly, it allowed the appeal of the respondent and permitted it to take credit in the Cenvat account and utilise the same for payment of duty. Aggrieved by the same, the Revenue is before this Court in the present appeal.

9. The principal stand of learned counsel appearing for the Excise Department in the appeal is that the respondent had opted out of the Modvat Scheme on 1-1-1997 and thus by the operation of Rule 57H(7) of the Central Excise Rules, 1944, the amounts would lapse and cannot be allowed to be utilised for payment of duty on any excisable goods, whether cleared for home consumption or for export. Rule 57H(7) is in the following terms :-

"Rule 57H(7).?A manufacturer who opts for exemption from the whole of the duty of excise leviable on goods manufactured by him under a notification based on the value or quantity of clearances in a financial year, and who has been availing of the credit of the duty paid on inputs before such option is exercised, shall be required to pay an amount equivalent to the credit, if any, allowed to him in respect of inputs lying in stock or used in any finished excisable goods lying in stock on the date when such option is exercised and after deducting the said amount from the balance, if any, lying in his credit, the balance, if any still remaining shall lapse and shall not be allowed to be utilised for payment of duty on any excisable goods, whether cleared for home consumption or for export."

10. Learned counsel for the respondent, on the other hand, submits that in view of the fact that on account of the restraint imposed by the appellant-authorities

the respondent was unable to utilise input credit lying in the account, hence irrespective of the provisions of Rule 57H(7), the respondent ought to have been allowed to avail input credit and for further accumulation of which they were not at all responsible and which issue was not resolved on account of the action and inaction of the Excise authorities till 1-1-1997 when the respondent had opted out of the Modvat credit scheme. It is thus submitted that the Tribunal has taken an entirely correct view in the matter and issued the above directions.

11. On a consideration of the facts and circumstances of the case as stated in detail in the order of the Tribunal and also documents brought on the record to substantiate its case by the appellant-Revenue before us, it is evident that the non-utilization of the input credit were solely on account of the pending dispute between the parties which had arisen due to the failure of the Excise authorities to come up with a proper procedure in the matter of utilisation of input credit coupled with the restraint order as a result of which the respondent could not utilise the said amount and the same continued to remain lying in its account except for an amount of Rs. 46 lacs which the respondents had taken out in the year 1994. Thus, we find that the Tribunal has taken a correct view in the matter and allowed the said credit to be taken in the Cenvat account of the respondent.

12. Apart from the same, upon looking deeply in the matter it has come out that sub-rule (7) of Rule 57H has been brought into force, as stated on enquiry by learned counsel for the Revenue itself, on 1-3-1997 and thus the same was not at all in existence on 1-1-1997 when the respondents had opted out of the Modvat credit. In the circumstances, it is not at all open for the appellant to place reliance upon the said rule for denying the benefit of the input credit lying in the Account of the respondent on the basis of the said sub-rule.

13. Thus, in the light of the above discussions, we do not find any question of law much less substantial question of law has been raised in the present appeal. The appeal is, accordingly, dismissed.

