(2016) 02 GUJ CK 0133

In the Gujarat High Court

Case No : Tax Appeal No. 1414 of 2005

Commr. of C. Ex., Ahmedabad-I APPELLANT

Vs

Balkrishna Textiles Mills Pvt. Ltd. RESPONDENT

Date of Decision : 17-02-2016

Acts Referred:

Citation : (2016) 340 ELT 55

Hon'ble Judges : Harsha Devani and G.R. Udhwani, JJ.

Bench : Division Bench

Advocate : Ms. Manisha Lavkumar, Advocate, for the Appellant; Shri Paresh M. Dave, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Harsha Devani, J. (Oral)—This appeal at the instance of the Commissioner of Central Excise, Ahmedabad is directed against the order 2005 (191) E.L.T. 309 (Tri.-Mum.) passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Mumbai (hereinafter referred to as the "Tribunal").

2. While admitting the appeal, this Court by an order dated 23-8-2006, had formulated the following substantial question of law :

"Whether the bar imposed under Rule 57G for taking credit availment within a period of 6 months is mandatory or not?"

3. Having heard the learned counsel for the respective parties, the Court is of the view that the above question does not bring out the controversy properly and is, accordingly, required to be re-framed as under :

"Whether the bar imposed under sub-rule (5) of Rule 57G of the Central Excise Rules, 1944 for availment of credit within a period of six months would be applicable in relation to deemed credit availed under sub-rule (5) of Rule 57G and Notification No. 29/96 issued thereunder?"

4. The respondent - M/s. Balkrishna Textile Mills Pvt. Ltd. is engaged in the

manufacture of Cotton Fabrics/Man Made Fabrics falling under Chapters 52, 54 and 55 of the Central Excise Tariff Act, 1985. The assessee, being an independent processor, was availing and utilizing deemed credit at the rate specified as per Condition No. 3 of Notification No. 29/96-C.E. (N.T.), dated 3-9-1996 prior to introduction of the compounded levy scheme in respect of independent processors under Section 3A of the Central Excise Act, 1944 (hereinafter referred to as "the Act"). During the course of assessment of RT-12 for the month of December, 1998, it was observed that the assessee had taken deemed credit to the tune of Rs. 46,97,771/- in its deemed credit register in the month of December, 1998 for the deemed credit involved in the goods exported under bond for the period July, 1997 to April, 1998, that is, after a lapse of seventeen months. It was the case of the Department that after a lapse of seventeen months, it was not permissible for the assessee to avail the deemed credit and accordingly, a show cause notice dated 18-6-1999 came to be issued to the assessee calling upon it to show cause as to why wrongly availed deemed credit to the tune of Rs. 46,97,771/- should not be recovered under Rule 57 (1) of the Central Excise Rules, 1944 (hereinafter referred to as "the Rules") read with Section 11A of the Act, and as to why penalty should not be imposed under Rule 173Q for violation of Rule 57A of the Rules.

5. By an Order-in-Original dated 24-9-1999, the adjudicating authority disallowed the deemed Modvat credit of Rs. 46,97,771/- under Rule 57-I of the Rules read with Section 11A of the Act and also imposed penalty under Rule 173Q of the Rules for contravention of Rule 57A thereof. The assessee carried the matter in appeal before the Commissioner (Appeals), Ahmedabad, who by an order dated 29-6-2000, directed the assessee to reverse the deemed credit from its deemed credit register forthwith and to produce proof thereof before the lower authority. He, however, set aside the penalty observing that the assessee had not utilized the same for discharge of its duty liability and the credit was taken only on 12-12-1998 in the deemed credit register. The assessee carried the matter in further appeal before the Tribunal and succeeded.

6. Ms. Manisha Lavkumar, learned Central Government Counsel for the appellant, assailed the impugned order by submitting that the Central Government, in exercise of powers conferred under sub-rule (2) of Rule 57A of the Rules, issued Notification No. 29/96, dated 3-9-1996 where under, the inputs and final products falling within the Schedule to the Central Excise Tariff Act, 1985 were granted "deemed credit". The notification was meant for the purpose of availment of deemed credit for composite mills and for manufacturers other than those of composite mills. The credit of duty which was deemed to have been paid would be allowed to the manufacturer of the final products when the final products would get cleared from the manufacturer''s factory. The emphasis being that the credit could be availed at the time of "clearance of the final products". It was pointed out that though Notification No. 29/96 has no prescribed time limit for availing the credit, Rule 57G (5) of the Rules already prescribed a time limit of six months for availing the credit. Referring to the contents of the said rule, it

was submitted that the same makes it explicitly clear that the time limit within which a manufacturer could take the credit was six months from the date of issuing invoice/duty paying document. It was argued that procedural restriction is permissible in law as long as it does not take away any vested right of the manufacturer. It was contended that Notification No. 29/96 issued under sub-rule (2) of Rule 57A of the Rules did not bear any time limit since Rule 57G (5), which came into force prior to the notification, that is, in the year 1995, already had a prescribed time frame for letting the manufacturer take credit. It was urged that the notification is required to be read in consonance with the rules since it gets its force and power by the rules and hence, the language of the rules is what ought to be looked at and construed strictly. It was submitted that there is no ambiguity whatsoever in terms of the language in Rule 57G (5) of the Rules.

6.1. Next, it was contended that even if it is considered that since this is a case of deemed credit and credit is admissible without producing documents evidencing payment of duty and hence, the time limit prescribed under Rule 57G would not be applicable, there has to be some time limit for claiming any benefit by the manufacturer and similarly, even for recovery by the department. The normal time limit fixed by the Legislature for claiming any benefit under the Central Excise Act and the rules is one year from the relevant date and hence, the availment of deemed credit by the assessee after a period of seventeen months is clearly beyond even a reasonable period of time.

6.2. It was pointed out that by a Notification No. 44/98, dated 10-12-1998 issued by the Central Government under sub-rule (2) of Rule 57A of the Rules, the earlier Notification No. 29/96 came to be modified by introducing Paragraphs 7B and 7C. As an outcome of the said notification, the benefit of deemed credit would cease to be available to those manufacturers (independent processors) under the earlier notification, that is, Notification No. 29/96, if they failed to clear their final products on or after 16-12-1998. It was submitted that in the facts of the present case, the goods were manufactured and cleared before 16-12-1998 and that the assessee, realizing that no further credit could be availed under the earlier Notification No. 29/96, sought to take the deemed credit amounting to Rs. 46,97,771/- for the period of July, 1997 to April, 1998 on 12-12-1998, after a gap of almost seventeen months, thereby contravening the proviso to Rule 57G (5) of the Rules.

6.3. In support of her submissions the learned counsel placed reliance upon the decision of the Supreme Court in the case of Osram Surya (P) Ltd. v. Commissioner of Central Excise, Indore, (2002) 9 SCC 20, for the proposition that by introducing a limitation in Rule 57G, the statute has not taken away any of the vested rights accrued to the manufacturers under the scheme of Modvat. That vested right continues to be in existence and what is restricted is the time within which the manufacturer has to enforce that right. Further, the language of the proviso is unambiguous and it specifically states that a manufacturer cannot take credit after six months. It was, accordingly, urged that the appeal deserves to be allowed and that the question is required to be answered in favour of the revenue.

7. Vehemently opposing the appeal, Mr. Paresh Dave, learned advocate for the respondent invited the attention of the Court to the provisions of Rule 57A of the Rules. It was submitted that sub-rule (1) thereof provides a scheme where duty actually paid on inputs would be allowed as Cenvat credit. It was submitted that Rule 57G is relatable to Rule 57A (1) of the Rules and provides for the manner of taking credit of duty paid on inputs under Rule 57A. It was submitted that in the present case, the notification in question provides for deemed credit as contemplated under sub-rule (5) of Rule 57A of the Rules, which is a separate provision. Referring to the notification issued under sub-rule (2) of Rule 57A of the Rules, it was pointed out that all the inputs of the goods falling under Serial Nos. 1 and 2 are various kinds of fibres and yarn which are all duty paid. The unprocessed fabrics are exempt from payment of excise duty and hence, the processors would not pay duty and claim Cenvat/Modvat credit. Therefore, a provision has been made for deemed credit of the duty paid on final product. Referring to Paragraphs 4, 6 and 7 of the notification, it was submitted that the same provide for cases where deemed credit would not be available. It was argued that it is not the case of the revenue that during the period July, 1997 to April, 1998, the goods have not been exported. It was submitted that the fact that the final products have been exported after following due procedure, is not in dispute. The fact regarding duty actually leviable or payable on the final product is also not in dispute. Further, there is no dispute as regards the amount. All the transactions are accounted for. The only objection of the revenue is that the respondent did not take credit at the time when it exported the goods. It was submitted that in the light of the question framed at the time of admission of the appeal, the only question that arises for consideration is as to whether the bar of Rule 57G would apply in the facts of the present case.

7.1. Referring to Rule 57G of the Rules, it was submitted that sub-rule (5) applies only to documents under sub-rule (3) thereof. Referring to the scheme of the rules, it was pointed out that under Rules 57A (1) and 57G, credit is taken when the inputs are received, whereas under the notification issued under Rule 57A (5), deemed credit can be availed at the time of clearance of the products. It was submitted that in the present case, the benefit is not sought to be denied on the ground that it was not otherwise available to the assessee, but only on the ground that it could not have been availed after seventeen months. It was submitted that there is no undue advantage to the assessee, nor is any prejudice caused to the revenue, inasmuch as, entitlement to avail of deemed credit is not otherwise in dispute. It was pointed out that with effect from 16-12-1998, the compounded levy scheme was brought into force and Cenvat credit was done away with. The Tribunal found as a matter of fact that the assessee was under a bona fide belief that it was not entitled to deemed credit. It was submitted that the Tribunal is the final fact finding authority and in the absence of any perversity in the findings recorded by the Tribunal, there would be no warrant for interference.

7.2. Insofar as reliance placed by the learned counsel for the appellant on Notification No. 44/98-C.E. (N.T.), dated 10-12-1998 is concerned, it was pointed out that Paragraphs 7B and 7C thereof do not have any relevance insofar as the facts of the present case are concerned. It was further submitted that the said notification does not provide anything contrary to the interest of the assessee. It was submitted that insofar as Paragraph 7C is concerned, the same relates to a transitional stage in relation to goods which were covered by the earlier notification and were not cleared prior to 16-12-1998 when the new notification came to be issued. Reliance was placed upon the decision of this Court in the case of Baroda Rayon Corporation Ltd. v. Union of India and Others, 2014 (306) E.L.T. 551, to submit that there cannot be a time limit for claiming Cenvat credit even on actual basis. It was submitted that sub-rule (5) of Rule 57A of the Rules opens with a non obstante clause and lays down that the scheme applies to those goods where the declared inputs are not used directly by the manufacturer of final product. The scheme, under sub-rule (5) of Rule 57A of the Rules, applies to those cases where inputs are not used by the processor directly. The inputs are not received in the factory, and therefore, the question of inputs being received in the factory under invoice would not arise. It was submitted that under Rule 57G (3) of the Rules, the inputs are received for which credit is allowed, whereas the scheme of Rule 57A (5) has nothing to do with Rule 57G (3) and hence, Rule 57G (5) would not apply. It was submitted that sub-rule (5) of Rule 57A of the Rules is a complete separate code in itself and that no reference is required to be made of any other provision of the rules. It was pointed out that Rules 57A to 57J fall under Section AA of Chapter-V of the Rules. It was submitted that there is a conscious departure insofar as Rule 57A (5) is concerned, and it is not subject to Section AA of the Rules. Referring to Notification No. 29/96, it was submitted that the same makes provision for all eventualities and is a complete code in itself and that the other provisions of Section AA of the Rules would not apply and consequently, the provisions of Rule 57G (5) would not be applicable in the facts of the present case.

7.3. To bolster his submissions, the learned counsel placed reliance upon the decision of this court in the case of Commissioner of Central Excise and Customs v. Gujarat Bottling Co. Ltd., 2010 (259) E.L.T. 13 (Guj.), to submit that the time limit prescribed under Rule 57G (5) of the Rules would not be applicable to the facts of the present case. Reference was also made to the decision of the Bombay High Court in the case of Kirloskar Brothers Ltd. v. Union of India and Others, 1988 (34) E.L.T. 30 (Bom.), on which reliance has been placed by the Tribunal, while holding in favour of the assessee. Reliance was also placed upon the decision of this Court in the case of Commissioner of Central Excise and Customs, Surat-I v. Swagat Synthetics, 2008 (232) E.L.T. 413 (Guj.). It was, accordingly, urged that the appeal being devoid of merits, deserves to be dismissed and that the question is required to be answered in favour of the assessee.

8. From the question as formulated by this Court at the time of admission of the appeal, the scope of the appeal is limited to the adjudication of the controversy as to whether the bar imposed under Rule 57G of the Rules for taking credit within a period of six months is mandatory or not.

9. Before adverting to the merits of the controversy, it would be germane to refer to the relevant statutory provisions. Rule 57A of the Rules bears the heading "Applicability" and sub-rule (1) thereof provides that, "The provisions of this section shall apply to such finished excisable goods (hereafter, in this section, referred to as the final products) as the Central Government may, by notification in the Official Gazette, specify in this behalf for the purpose of allowing credit of any duty of excise or the additional duty under Section 3 of the Customs Tariff Act, 1975 (51 of 1975), as may be specified in the said notification (hereafter, in this section, referred to as the specified duty) paid on the goods used in the manufacture of the said final products (hereafter, in this section, referred to as the input)."

On an analysis of Rule 57A, it is apparent that what the same provides is that the provisions of Section AA shall apply to finished excisable goods, namely, final products; the Central Government would specify such goods by notification; and the purpose for issuance of such notification is to allow credit of any duty of excise paid on the goods in the manufacture of final products, viz., inputs.

10. The notification applicable to the assessee is under sub-rule (5) of Rule 57A of the Rules, and hence, it would be necessary to advert to the same. Sub-rule (5) of Rule 57A of the Rules reads thus :

"(5) Notwithstanding anything contained in sub-rule (1), the Central Government may, by notification in the Official Gazette declare the inputs on which declared duties of excise or additional duty (hereinafter referred to as declared duty) paid shall be deemed to have been paid at such rate or equivalent to such amount as may be specified in the said notification and allow the credit of such declared duty deemed to have been paid in such manner and subject to such conditions as may be specified in the said notification even if the declared inputs are not used directly by the manufacturer of final products declared in the said notification, but are contained in the said final products."

11. Thus, sub-rule (5) of Rule 57A of the Rules opens with a non obstante clause and says that notwithstanding anything contained in sub-rule (1), the Central Government may by notification in the Official Gazette declare inputs on which declared duties of excise or additional duty paid shall be deemed to have been paid at such rate or equivalent to such amount as may be specified. The credit may be allowed of such declared duty deemed to have been paid in such manner and subject to such conditions as may be specified, even if the declared inputs are not used directly by the manufacturer of final products declared in the said notification, but are contained in the said final products.

12. On a conjoint reading of sub-rule (1) and sub-rule (5) of Rule 57A of the

Rules, the basic distinction between the two is that under sub-rule (1), it is the final products which are notified, whereas under sub-rule (5), it is the inputs on which duty is deemed to be paid at such rate or equivalent to such amount which are notified. Section AA mainly deals with sub-rule (1) of Rule 57A and the provisions of the said section are also made applicable to the finished goods notified in exercise of powers conferred under that rule.

13. Thus, on a plain reading of sub-rule (5) of Rule 57A of the Rules, it is evident that credit is required to be allowed in such manner and subject to such conditions as may be specified. These conditions are not specified in the rules and hence, one has to look at the notification to find out the conditions subject to which deemed credit can be allowed. A perusal of Notification No. 29/96 shows that Paragraph 1 of the said notification specifies the inputs and the final products covered under the said notification. Paragraph 2 thereof provides for the duties which are deemed to have been paid on the inputs declared therein and further provides the rate of duty. It further provides that the credit of the declared duty so deemed to have been paid shall be allowed to the manufacturer of the final products, without production of documents evidencing payment of duty on the said inputs, at the time of clearance of the said final products. On a reading of the notification as a whole, there is nothing therein to suggest any limitation as regards availment of deemed credit.

14. As noticed earlier, the provisions of Section AA apply to the finished excisable goods notified by the Central Government under Rule 57A (1) of the Rules. Insofar as the inputs on which declared duties are deemed to have been paid as notified under sub-rule (5) of Rule 57 are concerned, the provisions of Section AA have not been made applicable. Therefore, the provisions of Rule 57G cannot be made applicable to inputs or final products notified under sub-rule (5) of Rule 57A of the Rules.

15. Apart from the fact that Section AA of the rules having not been made applicable to the inputs and final products declared under sub-rule (5) of Rule 57A of the Rules, the applicability of Rule 57G (5) of the Rules may also be independently examined. Rule 57G provides for taking credit of the duty paid on inputs under Rule 57A. Sub-rule (1) thereof provides for the procedure to be observed by the manufacturer. Sub-rule (2) provides that a manufacturer who has filed a declaration under sub-rule (1) may, after obtaining the acknowledgment, take credit of the duty on the inputs received by him. Sub-rule (3) provides that no credit under sub-rule (2) shall be taken by the manufacturer unless the inputs are received in the factory under the cover of any of the documents enumerated thereunder. Sub-rule (4) provides that no credit shall be taken by the manufacturer in respect of invoices referred to in clause (g) of sub-rule (3) after 30th September, 1996. Sub-rule (5), which is relevant for the present purpose, provides that credit shall also not be taken by the manufacturer after six months of the date of issue of any document specified in sub-rule (3) and where the intermediate products manufactured by the user of inputs

specified under Rule 57J are received by the manufacturer, after nine months. It may also be noted that rule employs the word "also", viz., "credit shall also not be taken by the manufacturer after six months of the date of issue of any document specified in sub-rule (3)". Therefore, sub-rule (5) is in addition to what is provided under sub-rule (4) thereof, namely, "no credit shall be taken by the manufacturer in respect of invoices referred to in clause (g) of sub-rule (3) after 30th September, 1996". Moreover, on a plain reading of sub-rule (5) of Rule 57G of the Rules, it is apparent that the same applies to those manufacturers who intend to take credit of duty paid on inputs under Rule 57A of the Rules. Assuming for the sake of argument that Rule 57G of the Rules applies to deemed credit, the operation of the said rule qua cases governed by Notification No. 29/96 may be examined.

16. Rule 57G (5) of the Rules provides for a period of limitation of six months from the date of issue of any document specified in sub-rule (3) thereof for the purpose of taking credit. Adverting to Notification No. 29/96, it may be noted that the same specifically provides that credit of the declared duty deemed to have been paid shall be allowed to the manufacturer of final products, without production of documents evidencing payment of duty on the said inputs at the time of clearance of final products. Thus, under the scheme of the notification, deemed credit can be availed of without production of documents evidencing payment of duty on the inputs. Thus, for the purpose of applicability of sub-rule (5) of Rule 57G, the limitation would commence from the date of issuance of the documents specified in sub-rule (3) thereof, whereas, insofar as the availment of deemed credit under Notification No. 29/96 is concerned, provision is made for availing the same without any document evidencing payment of duty on the inputs. Under the circumstances, in the absence of any documents specified in sub-rule (3) of Rule 57G of the Rules being available for the purpose of availment of deemed credit, the limitation would not commence to run insofar as the deemed credit is concerned. Consequently, it would not be possible to apply sub-rule (5) of Rule 57G of the Rules to the facts of the present case.

17. Insofar as the reliance placed upon the subsequent notification dated 10-12-1998 for the purpose of imputing mala fide motives to the assessee of availment of deemed Cenvat credit only in view of the new notification having been issued is concerned, in the opinion of this Court while examining the applicability or otherwise of a statutory provision under a taxing statute, it is not necessary to go into the question of motive for availing the benefit thereof. All that is required to be examined is the question of entitlement to such benefit. In the facts of the present case, the entitlement of the respondent to deemed credit is not in dispute. The only dispute which has been raised is that the availment of deemed credit after seventeen months is beyond a reasonable period of time.

18. As discussed herein above, sub-rule (5) of Rule 57G of the Rules postulates that credit shall also not be taken by the manufacturer after six months of the date of issue of any document specified in sub-rule (3) thereof and where

intermediate products manufactured by the user of inputs specified under Rule 57 are received by the manufacturer, after nine months. But neither sub-rule (5) of Rule 57A of the Rules under which Notification No. 29/96 has been issued provides for any limitation for availment of the benefit under the notification, nor does Notification No. 29/96 provide for any such limitation. However, merely because Rule 57A (5) or Notification No. 29/96 does not provide for a limitation for availing of the benefit of deemed credit, the limitation under Rule 57G (5) of the Rules cannot be read into the scheme of Rule 57A (5). When the statute does not provide for any limitation, no limitation can be read therein.

19. As regards the interpretation of the provisions of a taxing statute is concerned, it may be germane to refer to the decision of the Supreme Court in Manish Maheshwari v. CIT, (2007) 3 SCC 794, wherein it has been held thus :

"13. A taxing statute, as is well known, must be construed strictly. In Sneh Enterprises v. Commr. of Customs, (2006) 7 SCC 714, it was held :

"24. While dealing with a taxing provision, the principle of ''strict interpretation'' should be applied. The court shall not interpret the statutory provision in such a manner which would create an additional fiscal burden on a person. It would never be done by invoking the provisions of another Act, which are not attracted. It is also trite that while two interpretations are possible, the court ordinarily would interpret the provisions in favour of a taxpayer and against the Revenue."

14. Yet again in J. Srinivasa Rao v. Govt. of A.P., (2006) 12 SCC 607, it was held :

"19. In a case of doubt or dispute, it is well settled, construction has to be made in favour of the taxpayer and against the Revenue."

15. In Ispat Industries Ltd. v. Commr. of Customs, (2006) 12 SCC 583, this Court opined :

"26. In our opinion if there are two possible interpretations of a rule, one which sub-serves the object of a provision in the parent statute and the other which does not, we have to adopt the former, because adopting the latter will make the rule ultra vires the Act."

20. In the light of the above discussion, this Court is of the view that the Tribunal, in the impugned order, has rightly held that Rule 57G of the Rules would not be applicable to the facts of the present case.

21. For the foregoing reasons, it is not possible to state that the impugned order passed by the Tribunal suffers from any legal infirmity warranting interference. The appeal is, accordingly, dismissed. The question is, accordingly, answered in the negative, that is, against the revenue and in favour of the assessee.