(2012) 08 GUJ CK 0055

In the Gujarat High Court

Case No : Tax Appeal No. 2520 of 2010 with T.A. No''s. 896 of 2011 and 1586 of 2010

Commr. of C. Ex. and Cus., Ahmedabad-II APPELLANT

Vs

Intas Pharmaceuticals Ltd. RESPONDENT

Date of Decision : 29-08-2012

Acts Referred:
Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 — Section 3
Customs Tariff Act, 1975 — Section 3
Finance Act, 2001 — Section 136, 136
Finance Act, 2007 — Section 138

Citation : (2013) 289 ELT 256

Hon'ble Judges : Bhaskar Bhattacharya, C.J;V.M. Sahai, J;A.L. Dave, J

Bench : Full Bench

Advocate : Y.N. Ravani and Darshan M. Parikh, for the Appellant; Paresh Dave and Dhaval Shah, Counsels, for the Respondent

Judgement

Bhaskar Bhattacharya, C.J.—These three appeals have been referred to a Larger Bench by a Division Bench of this Court (Coram: Akil Kureshi & Ms. Sonia Gokani, JJ.) for considering the following question:

Whether in view of the provisions contained in Rule 3 of the Cenvat Credit Rules, 2004 and Rule 21 of the Central Excise Rules, 2002, the decisions of this Court in case of Commr. of C. Ex. and Cus. Vs. GDN Garments, and Commissioner of C. Ex. and Customs Vs. Biopac India Corporation Ltd., lay down correct law in holding that even after remission of duty upon destruction of final product, the manufacturer is not required to reverse the Cenvat Credit on the inputs used in manufacturing such final product?

The referring Division Bench took note of the fact that similar issue had come up before the Court in the earlier two Division Bench decisions, one in the case of GDN Garments (supra), and the other, in the case of Biopac India Corporation Ltd. (supra).

2. In the case of GDN Garments (supra), the Division Bench was of the view that on a plain reading of the order of the Tribunal impugned in the said appeal, it was apparent that the Tribunal while holding that cenvat credit in respect of inputs contained in finished/semi-finished goods could not be demanded and the Tribunal had followed the decision of the Larger Bench of the Tribunal. Consequently, according to the said Division Bench, in the absence of any distinguishing feature having been pointed out on behalf of the Revenue, no infirmity could be found in the approach adopted by the Tribunal. The said Division Bench, therefore, was of the opinion that the order impugned in the said appeal did not give rise to any question of law, much less a substantial question of law. The Division Bench further noted that in almost similar matter, the said Bench had earlier dismissed Tax Appeal No. 1363 of 2009 vide order dated 24th June 2010. Thus, the appeal was dismissed.

3. Similarly, in the case of Biopac India Corporation Ltd. (supra), in the very similar circumstances, the issue reached the High Court at the instance of the Revenue. The Division Bench rejected the appeal by taking note of the fact that the Tribunal had accepted as a finding of fact that the Adjudicating Authority had not disputed the fact that the finished goods as well as semi-finished goods were fully destroyed in the fire in spite of the respondent having taken all precautions. The Tribunal placed reliance upon the decision of the Larger Bench of the Tribunal in the case of Grasim Industries v. C.C.E., Indore, reported in 2007 (208) E.L.T. 336 (Tri.-LB), wherein it was held that the credit availed on inputs destroyed in fire was not required to be reversed and accordingly, set aside the demand on that count. By taking note of the aforesaid fact, the Division Bench held that the Tribunal had merely followed an earlier decision of the Larger Bench of the Tribunal and based its conclusions upon findings of fact recorded by it upon appreciation of the evidence on record, and therefore, the decision did not call for intervention.

4. After taking note of the aforesaid two decisions, the referring Division Bench observed that Cenvat Credit was made available to a manufacturer using duty-paid inputs for manufacture of dutiable final product to avoid the cascading effect of the excise duty. In the said case, the referring bench proceeded, as the facts emerged, the manufacturer was granted the remission of the duty on the final product because of destruction of its drugs found to be unfit for human consumption, and, therefore, the duty element on such final product was waived. According to the referring Division Bench, to permit the respondent to retain the Cenvat Credit on the input used in manufacture of such final product, it was possible to argue, would amount to double benefit or benefit which was wholly unintended by law.

5. The referring Division Bench also noted that the contention of the assessee that in terms of Rule 3 of Cenvat Credit Rules, the right of the respondent to avail and retain Cenvat Credit was crystallized the moment the raw material or the input was used in manufacturing of a final product which was neither exempt

from duty nor carried nil rate of duty would also require a closer scrutiny. The referring Division Bench further noted the additional contention of the assessee that sub-rule 5(C) of Rule 3 of Cenvat Credit Rules having been introduced with effect from 7th September, 2007, the question whether for the period prior to such date, the requirement of reversal of Cenvat Credit would arise or not would also be met with if such rule was held to be clarificatory or declaratory in nature. The referring Division Bench further recorded that under the said newly introduced sub-rule, it was provided that when on the goods manufactured or produced by the assessee, the payment of duty was ordered to be remitted under Rule 21 of the Central Excise Rules, the Cenvat Credit taken on the inputs used in the manufacture or production of said goods should be reversed. Thus, according to the referring division Bench, at least from 7th September, 2007, the legislative position has become amply clear. However, the referring Division Bench also took note of the fact that whether it could be said that prior to 7th September, 2007, in absence of sub-rule 5(C) to Rule 3, there was any such legislative intent, is a matter to be probed into.

6. Finally, the referring Division Bench was of the view that as the above aspects of the matter were not considered by the Division Bench in the cases of GDN Garments (supra) and Biopack India (supra), the entire situation required a further consideration and being a coordinate Bench, it would not be open for the referring Division Bench to take a different view and, therefore, Their Lordships decided to refer the matter to a Larger Bench.

7. In order to appreciate the question referred to this Bench, it will be appropriate to refer to the relevant portion of the provisions contained in Rule 3 of the Cenvat Credit Rules and Rule 21 of the Central Excise Rules, which are quoted below:-

8. Rule 3 of the Cenvat Credit Rules, relevant for the purpose of disposing of the Reference is quoted below:-

3. CENVAT credit.-

(1) A manufacturer or producer of final products or a provider of taxable service shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of-

(i) the duty of excise specified in the First Schedule to the Excise Tariff Act, leviable under the Excise Act;

(ii) the duty of excise specified in the Second Schedule to the Excise Tariff Act, leviable under the Excise Act;

(iii) the additional duty of excise leviable u/s 3 of the Additional Duties of Excise (Textile and Textile Articles) Act, 1978 (40 of 1978);

(iv) the additional duty of excise leviable u/s 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957);

(v) the National Calamity Contingent duty leviable u/s 136 of the Finance Act, 2001 (14 of 2001);

(vi) the Education Cess on excisable goods leviable u/s 91 read with section 93 of the Finance (No. 2) Act, 2004 (23 of 2004);

(via) the Secondary and Higher Education Cess on excisable goods leviable u/s 136 read with section 138 of the Finance Act, 2007 (22 of 2007);

(vii) the additional duty leviable u/s 3 of the Customs Tariff Act, equivalent to the duty of excise specified under clauses (i), (ii), (iii), (iv), (v), (vi) and (via);

(viia) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act:

Provided that a provider of taxable service shall not be eligible to take credit of such additional duty;

(viii) the additional duty of excise, leviable u/s 157 of the Finance Act, 2003 (32 of 2003);

(ix) the service tax leviable u/s 66 of the Finance Act;

(x) the Education Cess on taxable services leviable u/s 91 read with section 95 of the Finance (No. 2) Act, 2004 (23 of 2004); and

(xa) the Secondary and Higher Education Cess on taxable services leviable u/s 136 read with section 140 of the Finance Act, 2007 (22 of 2007); and

(xi) the additional duty of excise leviable u/s 85 of Finance Act, 2005 (18 of 2005):

Provided that the CENVAT credit shall be allowed to be taken of the amount equal to central excise duty paid on the capital goods at the time of debonding of the unit in terms of the para 8 of Notification No. 22/2003-Central Excise, published in the Gazette of India, part-II, Section 3, sub-section (i), vide number G.S.R. 265(E), dated the 31st March, 2003.

paid on-

(i) any input or capital goods received in the factory of manufacture of final product or premises of the provider of output service on or after the 10th day of September, 2004; and

(ii) any input service received by the manufacturer of final product or by the provider of output services on or after the 10th day of September, 2004,

including the said duties, or tax, or cess paid on any input or input service, as the case may be, used in the manufacture of intermediate products, by a job-worker availing the benefit of exemption specified in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 214/86-Central Excise, dated the 25th March, 1986, published in the Gazette of India vide number G.S.R. 547(E), dated the 25th March, 1986, and received by the manufacturer for use in, or in relation to, the manufacture of final product, on or after the 10th day of September, 2004.

Explanation. - For the removal of doubts it is clarified that the manufacturer of the final products and the provider of output service shall be allowed CENVAT credit of additional duty leviable u/s 3 of the Customs Tariff Act on goods falling under heading 9801 of the First Schedule to the Customs Tariff Act.

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9. Rule 21 of the Central Excise Rules:-

21. Remission of duty.-

Where it is shown to the satisfaction of the Commissioner that goods have been lost or destroyed by natural causes or by unavoidable accident or are claimed by the manufacturer as unfit for consumption or for marketing, at any time before removal, he may remit the duty payable on such goods, subject to such conditions as may be imposed by him by order in writing:

Provided that where such duty does not exceed ten thousand rupees, the provisions of this rule shall have effect as if for the expression "Commissioner", the expression "Superintendent of Central Excise" has been substituted:

Provided further that where such duty exceeds ten thousand rupees but does not exceed one lakh rupees, the provisions of this rule shall have effect as if for the expression "Commissioner", the expression "Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be," has been substituted:

Provided also that where such duty exceeds one lakh rupees but does not exceed five lakh rupees, the provisions of this rule shall have effect as if for the expression "Commissioner", the expression "Joint Commissioner of Central Excise or Additional Commissioner of Central Excise, as the case may be," has been substituted.

10. Mr. Parikh and Mr. Ravani, the learned counsel appearing on behalf of the Revenue in these matters, strenuously contended before us that the Cenvat credit is made available to a manufacture using duty paid inputs for manufacture of dutiable final product in order to avoid cascading effect of the excise duty. According to them, once the manufacturer is granted remission of the duty on the final product on account of destruction of the final product, the duty element of such final product is thus waived. The learned counsel for the Revenue contend that once the respondent is permitted to retain the cenvat credit on the inputs used in manufacturing such final product, though the final product has been exempted from duty, it would amount to conferment of double benefit to the assessee. The learned counsel for the Revenue contend that it was never the intention of the Legislature to confer such benefit although the ultimate product has been made duty free.

11. The learned counsel for the appellants further contend that by introduction of sub-rule (5C) of Rule 3 of the Cenvat Credit Rules, such intention of the Legislature has been reflected and thus, by way of legislative enactment, it has been made clear that once remission has been given to the final product for the destruction of the final product for fire or otherwise, the Cenvat credit earlier given, should be reversed. Mr. Parikh and Mr. Ravani contend that the aforesaid sub-rule (5C) of Rule 3 of Cenvat Credit Rules is really clarificatory in nature and thus, it has application not only from the date of introduction of the new sub-rule (5C) but the same principle applies also in respect of credit already taken prior to September 7, 2007. The learned counsel for the Revenue, therefore, submit that the provision contained in sub-rule (5C) of Rule 3 of Cenvat Credit Rules are retrospective in operation and the Cenvat credit already taken is reversible once remission has been given on the final product.

12. Mr. Dave, the learned counsel appearing on behalf of the respondent, has, on the other hand, laboriously contended before us that Cenvat credit is crystallized the moment the raw material or the input was used in manufacturing of final product and it has no connection with the question of exemption from duty subsequently given for destruction of the final product. By referring to the provision of remission of duty on final product for such event, Mr. Dave contends that in the concerned rule there is specific provision for grant of remission on imposing conditions, but once such remission has been granted unconditionally, there is no scope of reversing the credit of input already taken. In other words, according to Mr. Dave, while granting remission on final product, the revenue could impose condition that the Cenvat credit should be reversed but once such condition has not been imposed, there is no scope of interpreting the newly inserted sub-rule (5C) by describing the same as clarificatory in nature. Mr. Dave submits that the above sub-rule has been specifically enacted by the Legislature with effect from September 7, 2007 and thus, it has no application in respect of Cenvat credit taken earlier.

13. After hearing the learned counsel for the parties and after going through the provisions contained in Central Excise Act as well as the concerned Rules, we find that Cenvat is a scheme under which a manufacturer is allowed to utilize the duty paid on inputs by taking the same from the duty payable on the final product, subject to certain procedures prescribed under the Rules. It is only a benefit available to the manufacturer to utilize the duty paid on the inputs for payment of duty on the final product subject to the procedure laid down in the Rules. It does not directly affect or reduce the assessable value automatically. It, however, will result in reduction in the cost of final product to the extent of the credit but will not automatically reduce the assessable value which is to be determined in accordance with the provisions of the Act. It, therefore, cannot have any effect on the assessable value, which is to be determined in accordance with the provisions of the Act. Further, the assessable value is to be determined in accordance with the provisions of the Act and the credit as provided by Rules cannot have any overriding effect on the provisions of the Act.

14. We find substance in the contention of Mr. Dave that in a taxing statute one has to look at what is exactly or clearly stated and there is no room for ascertaining any intendment of the legislature. It is well known that there is no equity about a tax and there is also no presumption as to tax. Over and above, nothing can be read in and nothing can be implied from a taxing statute. One must look fairly at the language used Baidyanath Ayurved Bhawan (Pvt) Ltd., Jhansi Vs. The Excise Commissioner, U. P. and Others, .

15. If we go through the provisions of the Rules relating to Cenvat, we find that prior to introduction of sub-rule (5C), there was no provision, which provided for reversal of the credit by the excise authorities where it has been lawfully taken by a manufacturer. Therefore, the credit accrued at the moment the raw material or the input was used in manufacturing of a final product which was neither exempt from duty nor carried nil rate of duty. Such being the provision, as it stood in the Cenvat Credit Rules prior to September 7, 2007, there is no scope of application of equitable doctrine against the assessee and in favour of the Revenue on the ground that it will amount to conferring of double benefit. The moment sub-rule (5C) was introduced, the Legislature made its intention clear that from the date of coming into force of the said amended rule, in case of future remission on the ground mentioned in the said sub-rule, there will be reversal of the credit.

16. In this connection, we may profitably refer to the following observation of the Supreme Court in the case of Delta Engineers Vs. State of Goa and Others, laying down the principles to be followed in determining whether a statutory amendment is retrospective or clarificatory in nature:

We may next consider whether the 1992 and 1994 Amendments to the Rules were retrospective in operation. In Zile Singh v. State of Haryana this Court held: (SCC p. 8, para 13)

13. It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the legislature to affect existing rights, it is deemed to be prospective only....

(emphasis supplied)

The Amendment Rules do not provide that they are retrospective in operation. Nor do the circumstances warrant such an inference. In fact, the contention of the respondents is not that power to levy fees/charges for use of riverine land was created/vested in the Port Authorities, by virtue of the Amendment Rules and that such power was given to levy fees/charges retrospectively. The contention has been that the power to levy fees/charges existed ever since the Rules came into force on 5-4-1984 and that position was merely clarified by the

Amendment Rules in 1992 and 1994.

35. We have already held that the Amendment Rules of 1992 and 1994 are not clarificatory, but are provisions investing the Port Authorities with the power to levy and collect charges for occupation of government riverine land. Therefore, the demand for charges for use of government riverine land is valid only from 3-3-1994. Therefore the Port Authorities could not demand or recover any amount for the period prior to 3-3-1994. The Port Authorities are therefore liable to refund any amount recovered within three years prior to the date of the writ petition. Obviously, any amount paid during a period beyond three years from the date of the writ petition, is not recoverable as barred by delay and laches.

(Emphasis supplied by us).

17. In the cases before us, we have already pointed out that the amendment has been effected from a particular date and at the same time, prior to such amendment, there was no provision of reversal as introduced in the Rules by way of amendment under the circumstances stated therein. Thus, it is creation of a new right in favour of the Revenue and in such circumstances, in the absence of any contrary intention reflected from any of the provisions of the Statute, the amendment must be held to be prospective.

18. We are consequently unable to accept the contention of Mr. Parikh and Mr. Ravani, the learned counsel appearing on behalf of the Revenue, that the said amended rule is clarificatory in nature. It is apparent from the notification that the same was given effect to from a specified date, i.e., September 7, 2007.

19. Such being the position, we hold that sub-rule (5C) of the Rules is effective from September 7, 2007 and for input credited earlier, there is no scope of reversal of the credit if the finished product becomes unfit for human consumption unless any condition has been imposed for remission of duty in terms of Rule 21 of the Central Excise Rules, 2002 making it clear that the credit already taken is to be reversed. We, accordingly, answer the Reference in the above way. The Reference is thus disposed of. Let the matters be placed before the appropriate Bench as per the roster.