

(2010) 02 GUJ CK 0131
In the Gujarat High Court
Case No : Tax Appeal No. 968 of 2008

Commr. of Central Excise

APPELLANT

Vs

Shilpa Copper Wire Industries

RESPONDENT

Date of Decision : 25-02-2010

Acts Referred:

Central Excise Rules, 1944 — Rule 57A, 57F(4)
Central Excises and Salt Act, 1944 — Section 35G
CENVAT (Credit) Rules, 2002 — Rule 5
CENVAT (Credit) Rules, 2004 — Rule 5

Citation : (2011) 269 ELT 17

Hon'ble Judges : Rajesh H Shukla, J;K.A. Puj, J

Bench : Division Bench

Advocate : Gaurang H. Bhatt, for the Appellant; S. Suryanarayam, with Ms. Anushree Kapadia, for the Respondent

Judgement

K.A. Puj, J.—The Commissioner of Central Excise, Surat has filed this Tax Appeal u/s 35G of the Central Excise Act, 1944 proposing to formulate the following substantial questions of law for determination and consideration of this Court:

(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 Rules, 2004?

(ii) Whether in the facts and circumstances of the case, the Tribunal is justified and has substantially erred in law in dismissing the appeal of the Revenue and confirming the order of the learned Commissioner (Appeals) granting the refund contrary to Rule 5 of the Cenvat Credit Rules, 2004 as well as the refund of Rs. 5,21,009/-?

2. This Tax Appeal was admitted on 20-6-2009 and questions as proposed by the Revenue were formulated by this Court for determination and consideration.

3. During the pendency of this Tax Appeal, the Revenue has moved Civil Application No. 213/2008 for stay against the operation, implementation and execution of the judgment and order dated 27-11-2007/6-2-2008 2008 (127) ECC 222 passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Ahmedabad in Appeal No. E/368/2006. The said Civil Application was rejected by this Court on 5-2-2010 [2010 (258) E.L.T. A20 (Guj.)], by observing that pursuant to the order passed by the Tribunal, the refund has already been received by the assessee and hence there is no question of staying the order passed by the Tribunal. The Court has, further, observed that even while passing the order, the Tribunal has relied on the order in the case of Amitex Silk Mills Pvt. Ltd. v. Commissioner of Central Excise 2006 (194) E.L.T. 344 (Tri.-Delhi). The Revenue has challenged the said order of the Tribunal before the Apex Court and though the appeal was admitted by the Apex Court, the stay was not permitted.

4. In view of the matter, while rejecting the stay application, the Court has directed the Registry to place main Tax Appeal No. 968/2008 on Board on 10-2-2010. The appeal was, thereafter, finally heard on 25-2-2010.

5. It is the case of the Revenue that the Adjudicating Authority, while rejecting the refund claim in respect of unutilized Cenvat credit amounting to Rs. 36,41,330/- in respect of the clearance made to M/s. Ramdev Corporation, another 100% EOU at Chhatisgadh, sanctioned the refund claim amount of Rs. 5,21,976/- out of the refund claim of Rs. 5,26,976/- pertaining to the export made to Dubai through a third party exporter M/s. Petron Chemicals Ltd. Being aggrieved with the order of the Adjudicating Authority, the respondent-Assessee preferred an appeal before the learned Commissioner (Appeals). The learned Commissioner (Appeals) upset the decision of the Adjudicating Authority and allowed the appeal, inter alia, by holding as under :

(i) Any 100% EOU can avail the credit on the input/raw material procured on payment of duty and further refund of the accumulated credit may be taken under Rule 5 of Cenvat Credit Rules, 2002/2004.

(ii) The respondent had procured duty paid input viz. Continuous Cast Copper Wire Rods & MM, Poly Ehtylene (LT-XLPE) and PVC Com-pound (KL-12A) and availed Cenvat credit on the said input in view of the Notification No. 18/2004-C.E. (N.T.), dated 6-9-2004.

(iii) The final product manufactured out of these raw materials was cleared to another 100% EOU as deemed export.

(iv) The provisions of Rule 5 of Cenvat Credit Rules, 2002/2004 provide for refund of accumulated credit provided goods manufactured out of the raw materials procured on payment of duty, are exported.

(v) The final product had been cleared to another 100% EOU and such clearance came under the category of deemed export. For coming to the said conclusion, reliance was placed on the decision in the case of *Amitex Silk Mills Pvt. Ltd. vs. Commissioner of Central Excise, Surat-I* reported in 2006 (194) E.L.T. 344 (Tri.-Delhi).

(vi) Though the matter decided by the Tribunal was of Domestic Tariff Area (DTA) sale entitlement, the Lower Appellate Authority relying upon the observations made by the learned Third Member in the said case, held that provisions itself make no distinction among various types of exports and also in terms of the provisions, per se, does not call for exclusion of any exports.

(vii) The observation of the learned Third Member in the said judgment that the provisions of Rule 5 would apply not only to the physical export, but also to the deemed export and, therefore, the benefit of refund of unutilized Cenvat credit could not be allowed was held to be unsustainable.

(viii) Placing reliance on the Board's Circular No. 220/54/96-CX., dated 4-6-1996 and more particularly in para 2 thereof, it was held that the refund even in case of deemed export by 100% EOU is admissible.

6. The appeal was, thus, allowed by the learned Commissioner (Appeals) and the impugned Order-in-Original was set aside.

7. Being aggrieved and dissatisfied with the aforesaid order of the learned Commissioner (Appeals), the department preferred an appeal which came to be registered as Appeal No. E/368/2006. It is the say of the Revenue that the Tribunal has not dealt with the ground urged by pointing out that the decision of the Tribunal rendered in the case of 2002 (79) ECC 85 was appealed against the Revenue before the Hon'ble Supreme Court. The learned Member (Judicial) held that the Tribunal did not appreciate the language used in the said ground, as if the Revenue was sitting in judgment over the correctness or otherwise of the decision in the case of *Amitex Silk Mills*. However, the learned Member (Judicial) found that an identical issue was considered by the Tribunal in the subsequent judgment in the case of *Sanghi Textiles Ltd.* decided on 26-7-2006 [2006 (206) E.L.T. 854 (T)], laying down that inasmuch as the final products were cleared to another 100% EOU as deemed export, the same had to be treated as export and the refund of unutilized credit had to be made to the assessee. The Tribunal found no merit in the appeal and dismissed the same.

8. The order of the Tribunal is under-challenge in the present Tax Appeal.

9. Mr. Gaurang H. Bhatt, learned Standing Counsel appearing for the Revenue, has submitted that the Tribunal has erred in law in holding that there was no difference between deemed export and physical export and has further erred in holding that the clearances made by one 100% EOU were required to be treated as deemed export and, therefore, the refund was admissible under the provisions of Rule 5 of the Cenvat Credit Rules, 2004. He has further, submitted that the

Tribunal has committed a substantial error of law in placing reliance upon the Tribunal's decision in the case of Amitex Silk Mills where the issue was totally different and the facts of the present case clearly show that the said decision was unsustainable in the facts of the present case. He has, further submitted that the Tribunal has misread the Board Circular No. 220/54/96-CX., dated 4-6-1996 inasmuch as para-2 of the said circular only gave a direction that all such refund claims filed under the provisions of Rule 57F(4) of the Central Excise Rules, 1944 should be decided expeditiously. This mandate contained in the Board circular cannot be deemed to partake the character of mandating that in case of valid deemed export, the same were required to be treated as physical export and could not be relied upon to come to a conclusion that the refund was admissible in law. He has, further, submitted that earlier Tribunal's judgment in the case of Ginni International Ltd., was then challenged by the Revenue before the Hon'ble Apex Court. He has further submitted that there was no justification in holding that the final products were cleared to another 100% EOU as deemed export were required to be treated as export and the refund of unutilized credit was required to be granted to the respondent-Assessee. He has, further, submitted that the Tribunal should have appreciated that the clearance made to M/s. Ramdev Corporation, another 100% EOU, was under bond executed in Form B-17 but the Adjudicating Authority found that the said M/s. Ramdev Corporation had executed a bond for procurement of duty free raw materials and the clearances effected by the respondent-Assessee were not against its own B-17 bond, and therefore, the Tribunal should have held that the respondent was not entitled to the benefit of refund of unutilized Cenvat credit.

10. He has, further, submitted that the benefits of deemed exports shall be available under paragraph - (d), (e), (f) & (g) of para-8.2 of the Foreign Trade Policy, 2004-2009 only if the supply is made under the procedure of International Competitive Bidding (ICB) and the benefit of deemed exports are given in para 8.3 of the Foreign Trade Policy. Thus, the supply made by the respondent to M/s. Ramdev Corporation another 100% EOU was treated as deemed export and for the said supply, the respondent was entitled to benefit only to the extent of the provisions contained in para-8.3 of the Foreign Trade Policy. He has, further, submitted that the appeal of the Revenue is required to be allowed and order passed by the Tribunal deserves to be set aside.

11. Mr. S. Suryanarayan, learned Senior Counsel appearing with Ms. Anushree Kapadia for the respondent, has submitted that the Tribunal while deciding the appeal filed by the Revenue against the respondent as referred to and relied upon its earlier decision in case of Amitex Silk Mills Pvt. Ltd. (supra). The Tribunal has extensively quoted the relevant portion of the said decision wherein it is observed that the provisions itself make no distinction among various types of exports. It refers to "exports". Therefore, the terms of the provision per se do not call for exclusion of any exports. Deemed exports have all the elements of exports, inasmuch as they are also against competitive international tendering and payment is in foreign exchange. Therefore, on merits also, there is no

justification for not treating deemed exports as exports. The Tribunal has also observed that from the economic efficiency angle, deemed export should be given higher weightage, inasmuch as while such export get the seller the benefit of exports, principally, payment in foreign exchange, the Indian buyer saves on freight and other elements of import cost, Thus, deemed export is a beneficial provisions for all concerned. A total win situation. The factor which is inhabiting the Revenue would appear to be the mention of "F.O.B.", value in the provision. The Tribunal took the view that this need not stand in the way. F.O.B. is in contrast to C.I.F. Value, in other words, value that excludes freight and insurance payable in connection with the export to another country. A deemed export value does not include freight or insurance. Therefore, it is not an inflated value. It is an F.O.B. value.

12. The Tribunal has also considered the Board's Circular No. 220/54/96-CX., dated 4-6-1996, wherein the Board has observed that the matter has been examined by the Board. Cash refund of the unutilized Modvat credit is an incentive given to manufacturers and exporter and non-grant of such claim will affect the competitiveness of the Indian Industry in the International Market. Accordingly, all such refund claim filed under the provisions of Rule 57F(4) of the Central Excise Rules, 1944 should be decided expeditiously wherever the manufacturer is not able to utilize the credit of duty, allowed under Rule 57A against the goods exported during the quarter/month to which the claim relates.

13. The Tribunal has also dealt with the contention raised on behalf of the Revenue that the Tribunal has wrongly relied upon the earlier decision in case of Cinni International Ltd., inasmuch as the same was appealed against by the Revenue before the Hon'ble Supreme Court. The Tribunal further observed that an identical issue was considered by the Tribunal in subsequent judgment in case of Sanghi Textiles Ltd. decided on 26-7-2006 laying down that in as much as the final products were cleared to another 100% EOU as deemed export, the same has to be treated as export and the refund of unutilized credit has to be made to the assessee. He has further submitted that the Tribunal has rightly decided the issue involved in the appeal and it is not justified in disturbing the finding recorded by the Tribunal in the said appeal.

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 outcome 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.

17. We, therefore, hold that Tribunal is justified and has not substantially erred in law in dismissing the appeal of the Revenue and confirming the order of the learned Commissioner (Appeals) granting the refund of Rs. 5,21,009/-.

18. This appeal is, therefore, dismissed without any order as to costs.