

(2015) 04 GUJ CK 0055
In the Gujarat High Court
Case No : Tax Appeal No. 127 of 2007

Jitendra Synthetics

APPELLANT

Vs

Commissioner of Central Excise and Customs

RESPONDENT

Date of Decision : 30-04-2015

Acts Referred:

Citation : (2015) 320 ELT 794

Hon'ble Judges : V.M. Sahai, A.C.J; R.P. Dholaria, J

Bench : Division Bench

Advocate : Paritosh Gupta for Paresh M. Dave, for the Appellant; Gaurang H. Bhatt, Advocates for the Respondent

Judgement

V.M. Sahai, Actg. C.J.

1. We have heard Mr. Paritosh Gupta for Mr. Paresh Dave, learned counsel for the petitioner and Mr. Gaurang Bhatt, learned counsel for the respondent.

2. This appeal was admitted on the following substantial questions of law:

"Whether the Appellate Tribunal was right in imposing penalty on the appeal under Rule 57U[6] in the facts of this case?"

3. The brief facts leading to the present appeal are that the appellant was engaged in the business of manufacturing goods like synthetic filament yarn which are excisable goods covered under Heading No. 5402.32 of the Central Excise Tariff.

4. The appellant is aggrieved by the orders passed by the Appellate Tribunal in Appeal No. 3467/02 which was the appeal filed by the appellant herein and also in Appeal No. 3428/02 which was filed before the Appellate Tribunal by the respondent Commissioner of Central Excise, Surat. Both these appeals involved the same subject matter, but there being two appeals filed by the appellant as well as the Department separately before the Appellate Tribunal and therefore there being two separate orders of the Appellate Tribunal, the appellant has filed

the present appeal.

5. The appellant brought and installed in its factory capital goods in the nature of texturing machine on which excise duties to the tune of Rs. 4,52,500/- were paid, and therefore, the appellant took credit of the above amount of duty paid on the texturising machine under Rule 57Q of the Central Excise Rules, 1944 which allowed the credit of duties paid on capital goods while paying duties on the final products in relation to manufacture of which the capital goods were used. The above machine was purchased and brought in the factory during financial year 1994-95 and this transaction was also reflected in the appellant's statutory records.

6. It appears that a show cause notice dated 16.12.1999 came to be issued to the appellant proposing to deny the above modvat credit of Rs. 4,52,500/- with interest and penalty on the grounds that the appellant had taken loan from Surat People's Co-operative Bank for Rs. 39 lakhs for purchasing the said texturising machine; that the payment for the capital goods was made by the said Bank under Loan Agreement with the appellant; that the appellant had not produced a certificate from the financial company to the effect that duty specified on the capital goods had been paid by the manufacturer to the financial company prior to first installment of repayment of loan as prescribed under Rule 57R[3] of the said Rule and therefore, the credit of duties paid on the said capital goods was not permissible.

7. The appellant filed reply dated 15.2.2000 to the above show cause notice.

8. The Joint Commissioner of Central Excise passed Order in Original dated 22.9.2000 denying the modvat credit of Rs. 4,52,500/- with penalty of equal amount under Rule 57U[6], and also demanding interest under Rule 57U[8] of the said Rules.

9. Being aggrieved by the said order, the appellant filed an appeal before the Commissioner [Appeals], Surat, which came to be decided by the Commissioner [Appeals] by order in appeal dated 3.6.2002, whereby the demand of duty was upheld. However, the appellate authority set aside the penalty on the ground that Rule 57U[6] under which equal amount of penalty was imposed was brought on the statute book only w.e.f. 23.7.1996 whereas the action of the appellant in taking modvat credit on the machine in question was during financial year 1994-95 and therefore, penal provision cannot be applied retrospectively.

10. The appellant thereafter filed an appeal before the Appellate Tribunal with stay application against the above order of Commissioner [Appeals]. The Appellate Tribunal, by order dated 1.7.2003 directed the appellant to pre-deposit a sum of Rs. 1.00 Lakh within 4 weeks for hearing of the appeal on merits. The appellant was passing through a very bad financial position and therefore could not deposit the above amount of Rs. 1.00 Lakh and therefore, the Appellate Tribunal dismissed the appeal for noncompliance of stay order passed under Section 35F of the Act vide order dated 8/17.9.2003.

11. In the meanwhile, the Commissioner of Central Excise, Surat also filed an appeal before the Appellate Tribunal against the above referred order dated 3.6.2002 passed by the Commissioner [Appeals], Surat as regards the penalty contending that penalty was liable to be imposed on the appellant and the action of the Commissioner [Appeals] in setting aside the penalty was not legal and proper. The Appellate Tribunal passed an order dated 7.7.06 on this appeal holding that penalty of Rs. 45,250/- being 10% of the duty was justified in this case and accordingly the Appellate Tribunal modified the order of the Commissioner [Appeals] by imposing penalty of Rs. 45,250/-.

12. According to the appellant the above order of the Tribunal is passed without hearing the appellant because the appellant had not even received the hearing notice for the appeal and therefore the appellant could not remain present before the Appellate Tribunal when the appeal was heard.

13. Mr. Paritosh Gupta, learned counsel for Mr. P.M. Dave for the appellant has urged that the Tribunal committed an error in imposing penalty of Rs. 45,250/- being 10% of the duty and, therefore, the order of the Tribunal is illegal as the Commissioner [Appeals] has recorded that the provision of Rule 57U[6] was not in existence in the year 1994 and the same has been added to the Central Excise Rules in July, 1996. Consequently, the Commissioner [Appeals] has set aside the penalty.

14. Having gone through the material on record, we are of the considered opinion that if the provision for imposing penalty was not in existence in December, 1994 when the contravention took place, then, there was no question of imposition of any penalty on the basis of the subsequent rule which was not in existence at the relevant time. The Apex Court in Commissioner of Central Excise, Mumbai-I v. Lal Mining Engg. Works, reported in 2007 [215] E.L.T. 167 [S.C.] has held in para-3 that the penalty cannot be invoked in a case which was before the Apex Court as the same would amount to giving retrospective operation thereto which is impermissible in law.

15. For the aforesaid reason, we find force in the submission of the learned counsel for the appellant. The appeal, therefore, succeeds and is allowed accordingly. The penalty imposed by the Tribunal of Rs. 45,250/- is set aside. The question framed by this Court is answered in favour of the assessee and against the Revenue.