(2000) 02 BOM CK 0005

In the Bombay High Court

Case No : Writ Petition No. 114 of 2000

Mukund A. Shah APPELLANT

Vs

CCE RESPONDENT

Date of Decision : 08-02-2000

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35F

Citation : (2000) 92 ECR 18

Hon'ble Judges : S.H. Kapdaia, J;A.P. Shah, J

Bench : Division Bench

Judgement

1. An interesting question of law has been raised in this Petition, namely, whether an assessee who applies for stay u/s 35F of the Central Excise Act can claim waiver of the pre-deposit on the ground that the balance in the Modvat Account remaining unutilised may be treated as sufficient to protect the revenue pending the appeal before the CEGAT.

2. The facts giving rise to this Petition, briefly, are as follows:

3. Petitioners carry on business in manufacturing of metallic yarn from excise paid metallised polyster film and exporting and selling the same as handicraft. By Notification No. 76/86-CE dated 10.2.1986, benefit of exemption to handicrafts has been granted by the Government. According to the Department, however, since the work was not done by hand and since cutting of duty paid polyster yarn into zari was done by machinery, the Authorities held that the zari is not handicraft. This is the point pending in appeal preferred by the assessee before the CEGAT. Pending the said appeal, Petitioners who have been charged for evasion of duty sought stay from the CEGAT. In the said stay application, the Petitioners pointed out that the Adjudicating Officer had confirmed the duty demand of Rs. 92,25,846/-. The main point on which reliance was placed by the assessee was that an amount of Rs. 93,84,576/- remained unutilised in their Modvat Account. It was urged before the Appellate Authority that the Petitioners were entitled to claim the benefit of the modvat credit to the extent of Rs.

93,84,576/-, particulars of which have also been given in Exhibit-C to the Petition. It was urged before the CEGAT that, under similar circumstances, in the case of 1999 (113) ELT 151 after taking into account the amount in the Modvat Account directed a smaller amount to be deposited as pre-deposit. CEGAT allowed the stay application in part and directed the assessee to deposit Rs. 40 lacs towards the duty demand. CEGAT, however, stayed recovery of penalty. Hence this Writ Petition.

4. Mr. Mehta, learned Counsel appearing on behalf of the Petitioners contended that modvat credit is nothing but duty of excise already paid on the inputs which is given credit and which is allowed to be utilised for payment of duty of excise on finished goods by the manufacturer. That by availing modvat credit, the person who has paid duty of excise in respect of the credit amount, is entitled in law to utilise the credit. He contended that the amount of balance in the Modvat Account remaining unutilised is like a bank balance of the tax payer. He urged that modvat credit can be utilised only for the payment of duty of excise on finished excisable goods. Accordingly, Mr. Mehta contended on facts that as long as modvat credit is lawfully due, the CEGAT should not have directed the Petitioners to deposit the aforestated amount of duty. Mr. Mehta urged that this point was specifically raised before the CEGAT which has not been considered in the impugned decision. Mr. Mehta further pointed out that the CEGAT has not even considered the Order of CEGAT in the case of Jai Jagdamba & Co. (Supra). Mr. Mehta urged that the huge amount of Rs. 93,84,576/- has remained unutilised in the Modvat Account of the Petitioners as against the Order of pre-deposit of Rs. 40 lacs passed by the CEGAT. He, accordingly, contended that CEGAT has failed to consider the Petitioners'' right to claim benefit of modvat credit to the extent of Rs. 93,84,576.00 in the impugned order while arriving at the pre-deposit amount of Rs. 40 lacs. Mr. Mehta urged that if this fact would have been taken into account then the Petitioners were not required to pre-deposit any amount. Mr. Mehta contended that, in any event, the Petitioners should not have been asked to pay Rs. 40 lacs as pre-deposit as the said amount stood secured by the modvat credit available to the Petitioners to the extent of Rs. 93,84,576/-.

5. We find merit in the contention of Mr. Mehta that the above point has not at all been considered by the CEGAT in the impugned order. In this case, CEGAT was required to consider, at the interim stage, whether the assessee should be directed to deposit Rs. 40 lacs particularly when the amount lying in his Modvat Account is Rs. 93,84,576/-. This point has not been examined. A statement has been given of the modvat credit at Exhibit-C of the Petition. Whether the assessee was entitled to the said modvat credit to the extent of Rs. 93,84,576/- has not been considered. Whether the calculations given at Exhibit-C to the Petition are correct has also not been considered. In the circumstances, the following order is passed:

ORDER

6. The impugned Order passed by CEGAT is set aside. We direct the CEGAT to consider the above question of modvat credit. We also direct the CEGAT to consider whether, in any event, Petitioners should be directed to bring in Rs. 40 lacs as pre-deposit particularly when the amount of balance in the Modvat Account of the Petitioners remained unutilised to the extent of Rs. 93,84,576/-.

7. CEGAT will consider the Petitioners'' application for stay within six (6) weeks. If the order of CEGAT is adverse to the Petitioners, the same shall not be implemented for a period of two weeks from the date of the communication. It is made clear that the Petitioners will move CEGAT within three (3) weeks. In case the Petitioners do not move CEGAT within the said period of three (3) weeks, the stay granted herein shall come to an end.

8. Subject to above, Writ Petition is disposed of.

9. Parties to act on the ordinary copy of this Order duly authenticated by the Associate of this Court.

C.C. expedited.

