
(2009) 02 P&H CK 0219
In the Punjab And Haryana At Chandigarh

Saurer Embroidery Systems (India) Pvt. Ltd.

APPELLANT

Vs

C.C.E.

RESPONDENT

Date of Decision : 26-02-2009

Acts Referred:

Central Excise Rules, 1944 — Rule 209, 57A, 57B, 57F, 57F(4A)
Central Excises and Salt Act, 1944 — Section 11A, 3(1), 35G, 37

Citation : (2010) 256 ELT 224

Hon'ble Judges : M.M. Kumar, J;H.S. Bhalla, J

Bench : Division Bench

Judgement

M.M. Kumar, J.—The dealer-appellant has approached this Court by filing the instant appeal u/s 35G of the Central Excise Act, 1944 (for brevity "the Act") challenging order dated 8-12-2006 (A-4) 2007 (208) ELT 568 passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi (for brevity "the Tribunal") claiming that following questions of law would emerge from the order of the Tribunal:

(i) Whether the Tribunal and the quasi judicial authorities are correct in ordering recovery of the Modvat Credit taken prior to the amendment to Rule 96ZI but utilized at a later date?

(ii) Whether an amendment to a substantive provision would have retrospective effect despite there being no mention of retrospective application in the amendment itself?

(iii) Whether imposition of penalty is justified in the circumstances of the case?

2. Brief facts of the case necessary for disposal of the controversy raised in the instant appeal may first be noticed. The dealer-appellant is engaged in the manufacture of embroidery products falling under Chapter No. 5805.19 of the Schedule to the Central Excise Tariff Act, 1985. It had been operating under the compounded levy scheme as provided under Rule 96ZH of the Central Excise Rules, 1944 (for brevity "1944 Rules"). Accordingly, the dealer-appellant had

also been availing the facility of Modvat Credit on the capital goods installed in the factory in terms of Rule 57Q of the 1944 Rules. The dealer-appellant had imported capital goods and had taken credit of the duty amounting to Rs. 31,18,085/- being the countervailing duty paid thereon as permissible under the scheme of Modvat. This credit had been entered in the relevant record on 18-3-1998. The credit so availed was being utilized for payment of Central Excise duty on the manufactured goods as available under the compounded levy scheme. The dealer-appellant had utilized an amount of Rs. 3,01,820/- towards payment of duty on the manufactured goods.

3. On 11-3-1999, a show cause notice was issued to the dealer-appellant requiring it to show cause as to why the amount of Rs. 3,01,820/- utilized by it towards payment of duty on the final product be not recovered from it and also as to why penalty be not imposed for contravention and utilization of the credit (A-1). The dealer - appellant duly entered its reply. However, the Adjudicating Authority confirmed the demand and also imposed a penalty of Rs. 30,000/- by invoking powers under Rules 209 and 96ZL of the Rules vide order dated 23-7-1999 (A-2).

4. The dealer-appellant challenged the order of the Adjudicating Authority before the Commissioner (Appeals), which was also dismissed vide order dated 18-6-2004 (A-3). However, a limited relief was granted by the Commissioner and the penalty was reduced to Rs. 2000/- under Rule 96ZL.

5. On further appeal by the dealer-appellant, the Tribunal dispensed with the requirement of pre-deposit of the whole demand and penalty except to the extent of Rs. 1,00,000/- vide its order dated 12-9-2005 which was duly deposited by the dealer-appellant prior to hearing of the appeal. The Tribunal has also dismissed the appeal vide order dated 8-12-2006 (A-4). The Tribunal has applied the provisions of Rule 96ZH as amended w.e.f. 2-6-1998 and proceeded to observe as under:

Considered the submissions made by the both sides perused records. It is undisputed that the appellant is discharging the duty liability on the embroidered products manufactured by him under the provisions of Rule 96ZH of the Central Excise Rules 1944 and that it is also not disputed that the appellant during the relevant period availed the benefit of Modvat Credit on the capital goods under Rule 57Q of the Central Excise Rules, 1944. In order to appreciate the rival claims it is necessary to read the provisions of Rule 96ZH as amended, during the relevant period by notification No. 15/98 and applicable to the current case. I may read the same:

Provided further that no credit of duty paid on inputs used in the manufacture of the embroidery and capital goods used within the factory of manufacture of such embroidery shall be allowed under Rule 57A, 57B or 57Q as the case may be.

It can be notified that the proviso very clearly precludes the appellant from availing the benefit of the Modvat under Rules 57A and 57Q. If that be so, then

the appellant's contention that they should not be denied the beneficial legislation falls flat on the face of the fact that the duty payment on the capacity of the production of the embroidery machines is an optional one.

6. The Tribunal also decided the issue of limitation in favour of the revenue in Para 7 which reads as under:

As regards the time bar issue I find the show cause notice is for the demand of clearances made during the period September 1998 to February 1999. The show cause notice is issued to the appellant on 11-3-1999, which is well within the period as indicated under the provisions of Section 11A of the Central Excise Act, 1944. The monthly returns for the month of September 98 are to be filed by the appellant on or before 5th October, 1998 and the limitation period starts from that date. The demand on the appellant being of the duty of the clearances made by them without discharging the duty and not for the reversal of the Modvat Credit, hence the appeal fails on this count also.

7. Dealing with the arguments that imposition of duty on the capacity of production is ultra vires, the Tribunal observed that an assessee intended to avail the benefit under the rules was required to first make an application under Rule 96ZH of the Rules and the discharge of the duty liability under the aforesaid rule was optional after the permission is granted by the jurisdictional Commissioner. The Tribunal invoked the principle in the nature of estoppel and proceeded to observe as under:

It can be noticed that the discharge of the duty liability under the said rules were optional and that also after the permission is granted by the jurisdictional Commissioner. If the duty liability is to be discharged at the option of the assessee and the assessee having full knowledge of the same opts for observing the provisions of the Rules 96ZH to 96ZM cannot turn around now and say that the impost under these rules are ultra vires. Section 3(1) of the Central Excise Act, 1944 read as under:

Section 3 Duties specified in the First Schedule to be levied : (1), They shall be levied and collected in such a manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in (India) and a duty on salt manufactured in, or imported by land into, any part of (India) as and at the rates, set forth in the First Schedule.

It can be noticed from the above reproduced sub-section that it contemplates levy and collection of the duty as may be prescribed on goods produced and manufactured in India. It is not in dispute that the products manufactured by the appellant will fall under the category of manufactured goods. The provisions of the Rules 96ZH to 96ZM were introduced for smoother way of collection of the duty and is for proper assessment of the duty on embroidered goods. The said rules cannot be considered as ultra vires for levy and collection of the duty, more so on the fact that the working under these rules were optional.

8. Mr. Suvineet Sharma, learned Counsel for the dealer-assessee has argued that the purpose behind the grant of Modvat Credit is to avoid the cascading effect of duty on the final product before it reaches the consumer. Therefore, it is unwarranted for the Tribunal to assume that the dealer-appellant had opted for the compounded levy scheme as envisaged under Rule 96ZH and the Modvat Credit would not be available to the dealer-appellant. He has further submitted that the assumption has been occasioned on account of an amendment made in the Rule 96ZH(I) w.e.f. 2-6-1998 vide Notification No. 15/98-C.E. (N.T.). He has also submitted that Modvat Credit and the scheme of utilizing the credit taken had been promulgated for the capital goods installed or used in the factory of manufacture in addition to the other specified goods. According to the learned Counsel, there is no distinction discernible either from the perusal of the Act or the Rules barring taking of permissible credit. He has emphasized that the very purpose of introducing the scheme of Modvat on capital goods is to encourage the domestic industry manufacturing capital goods and also keep it on par with the imported capital goods by permitting the credit of countervailing duty on such goods. In that regard, he has referred to the Finance Minister's speech made during the budget for the fiscal year 1994-95.

9. Another argument raised by the learned Counsel is that the amendment made to Rule 96ZH(I) would operate prospectively and would not affect the utilization of the credit taken by the dealer-appellant prior to the amendment. He has highlighted the fact that the credit by the dealer-appellant had become available prior to the date of the amendment made on 2-6-1998 and by amendment its utilization could not be denied to the dealer-appellant. In support of his submission, learned Counsel has placed reliance on the Division Bench judgment of Rajasthan High Court rendered in the case of Shankeshwar Fabrics Pvt. Ltd., Pali Vs. Union of India (UOI) and Others, and argued that a right to claim Modvat Credit accrues to the assessee on the date he paid the tax on raw material or inputs and that right would continue until the facility available thereto gets worked out or until those goods existed. Learned Counsel has referred to the judgment of the Supreme Court which has been followed by the Division Bench of Rajasthan High Court rendered in Eicher Motors Limited and Another Vs. Union of India and Others Etc., wherein the aforesaid principle has been laid down. Learned Counsel has also placed reliance on the judgment of the Tribunal, Northern Bench, New Delhi rendered in the case of 2002 (79) ECC 615 . The notification dated 2-6-1998 was not applied by the Tribunal to the transaction in respect of which Modvat Credit have already accrued.

10. Mr. Rajiv Malhotra, learned Counsel for the revenue has however argued that compounded levy scheme and Modvat Credit scheme are two different schemes and the dealer-appellant cannot be permitted to shift from one scheme to another. In that regard, he has placed reliance on the provisions of Rule 96ZH(1 & 3) and argued that the view taken by the Tribunal for making an application by the dealer-appellant to the Commissioner to avail benefits in substitution of the some provision in preference to others is mandatory. It is only then he could be

permitted to switch over for availing the benefit under the other scheme. In order to substantiate his submission, learned Counsel has placed reliance on a judgment of the Tribunal, Northern Bench, New Delhi rendered in the case of United Leasing & Industries Ltd. and argued that an embroidery manufacturer who had opted for availing the benefit accruing from special provisions of Section E-IX of Chapter V of the Rules 1944 for any period prior to 2-6-1998 would not be entitled to avail himself of the Modvat Credit facility in respect of inputs or capital goods. Mr. Malhotra has emphasized that availment of Modvat Credit by the dealer-appellant on capital goods under Rule 57Q and utilization thereof by it for payment of duty on embroidery under Rule 96ZI in respect of the period from September 1998 to February 1999 is wholly unwarranted and the Tribunal has rightly declared the same to be unlawful.

11. Having heard the learned Counsel and after minute perusal of the record with their able assistant, we find that it would first be appropriate to read Rule 96ZI as it stood before the amendment made on 2-6-1998 and the same reads as under:

96ZI. Discharge of liability for duty on payment of certain sum. - (1) Having regard to the average production of the embroidery per machine, and any other relevant factor, the Central Government may, by notification in the Official Gazette, fix from time to time, the rate per metre length of such machine, per shift, or per day, or per week, subject to such conditions and limitations as it may think fit to impose, and may fix different rates for such machines employed in the manufacture of different varieties of the embroidery or of the embroidery done on different varieties of base fabrics or for machines working at different speeds or for machines installed during different periods; and if a manufacturer whose application has been granted under Rule 96ZH pays before the commencement of any shift a sum calculated according to such rate, in the manner and subject to the conditions hereinafter laid down, such payment shall be full discharge of his liability for the duty leviable on his production of the embroidery during the said shift:

Provided that if there is an alteration in the rates of duty, the sum payable shall be recalculated on the basis of the revised rates from the date of alteration and liability for duty leviable on the production of the embroidery from that date shall not be discharged unless the differential duty is paid; if, however, the amount of duty so recalculated be less than the sum paid, the balance shall be refunded to the manufacturer.

Provided further than no credit of duty paid on inputs used in the manufacture of the embroidery and capital goods used within the factory of manufacture of such embroidery shall be allowed under Rule 57A, 57B or 57Q, as the case may be.

(2) The sum payable under Sub-rule (1) shall be calculated by application of the appropriate rate to the metre length of each of the machines intended to be employed by the manufacturer during the shift.

(3) Such sum shall be paid by such manufacturer by debit in the account-current maintained under Rule 96ZJ before commencement of the shift.

(4) If such payment is not made in the manner and within the time-limit laid down in this rule, the manufacturer shall, unless otherwise directed by the Commissioner, and in exceptional circumstances, be liable to pay duty on his entire production of the embroidery during the shift or shifts, in respect of which the payment was to be made, at the rate specified in the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986).

(5) Where the Commissioner has permitted the manufacturer to avail himself of the special provision contained in this section in respect of any period referred to in Sub-rule (5) of Rule 96ZH, the manufacturer shall file with the proper officer a duly signed statement showing in respect of every shift worked on each day during that period:

(a) the brand name and other identifying particulars of each of the machines employed;

(b) month and year of installation of each such machine;

(c) maximum revolutions per minute which each such machine is capable of working, at, and

(d) metre length of each such machine;

and shall, on demand, produce before such officer all his records and accounts to enable that officer to verify the statement so filed. After the proper officer has completed the verification, the sum payable under Sub-rule (1) in respect of such period shall be calculated by application of the appropriate rate to the metre length of all the machines employed by the manufacturer in each of the shifts during that period; and such sum shall be paid by the manufacturer in one lump sum into the Government treasury.

(6) In this rule:

(a) "metre length", in relation to a machine, means the distance between the points provided for the first and the last needles of the rollers on such machine;

(b) "shift" means a period not exceeding eight hours working in a day, exclusive of rest interval, provided the work of the same kind is carried out by the same set of workers.

12. It would also be necessary to read the second proviso which was added by amendment dated 2-6-1998 in Rule 96ZI(1) and the same reads as under:

Provided further that no credit of duty paid on the inputs used in the manufacture of the embroidery and capital goods used within the factory of manufacture of such embroidery shall be allowed under Rule 57A, 57B or 57Q as the case may be.

13. The prohibition which has been incorporated in the rule w.e.f. 2-6-1998 from availing the Modvat Credit on the input use in the manufacture of the embroidery and capital goods came into existence on 2-6-1998. Earlier to the aforesaid prohibition there was no provision made prohibiting availing of Modvat Credit under Rule 57A, 57B or 57Q. Moreover the proviso added on 2-6-1998 does not provide expressly that it was retrospective in nature and would also apply to the credit availed earlier to the date of the amendment which in the present case is 18-3-1998. Therefore, the Tribunal could not have taken shelter of the amended rule by applying it to a transaction resulting in accrual of Modvat Credit prior to the date of the amendment. The amendment by express words has specified that it is to come in operation from the date of its publication in the official gazette. In that regard, we find that the reliance of the dealer - appellant on the judgment of the Hon''ble Supreme Court in the case of Eicher Motors Ltd. is meritorious and would fully apply to the facts of the present case. In that case, validity and application of the scheme as modified by introduction to Rule 57F of the Central Excise Rules 1944 was considered by the Hon''ble Supreme Court under which credit which were relying unutilized with the manufacturer on the date of the application of the scheme was under consideration of the Hon''ble Supreme Court. After taking into account the various contentions raised by the parties, their Lordships has laid down that the dealer-appellant became entitled to take the credit of the input instantaneously once the input is received in the factory and the right to the credit has become absolute. The observation of the Hon''ble Supreme Court in that regard reads as under:

The stand of the assesseees is that they have utilized the facility of paying excise duty on the inputs and carried the credit towards excise duty payable on the finished products. For the purpose of utilization of the credit all vestitive facts or necessary incidents thereto have taken place prior to 16-3-1995 or utilization of the finished products prior to 16-3-1995. Thus the assesseees became entitled to take the credit of the input instantaneously once the input is received in the factory on the basis of the existing scheme. Now by application of Rule 57F(4A) credit attributable to inputs already used in the manufacture of the final products and the final products which have already been cleared from the factory alone is sought to be lapsed, that is, the amount that is sought to be lapsed relates to the inputs already used in the manufacture of the final products but the final products have already been cleared from the factory before 16-3-1995. Thus the right to the credit has become absolute at any rate when the input is used in the manufacture of the final product. The basic postulate, that the scheme is merely being altered and, therefore, does not have any retrospective or retro-active effect, submitted on behalf of the State, does not appeal to us. As pointed out by us that when on the strength of the rules available certain acts have been done by the parties concerned, incidents following thereto must take place in accordance with the scheme under which the duty had been paid on the manufactured products and if such a situation is sought to be altered, necessarily it follows that right, which had accrued to a party such as availability of a

scheme, is affected and, in particular, it loses sight of the fact that provision for facility of credit is as good as tax paid till tax is adjusted on future goods on the basis of the several commitments which would have been made by the assessee concerned. Therefore, the scheme sought to be introduced cannot be made applicable to the goods which had already come into existence in respect of which the earlier scheme was applied under which the assessee had availed of the credit facility for payment of taxes. It is on the basis of the earlier scheme necessarily the taxes have to be adjusted and payment made complete. Any manner or mode of application of the said rule would result in affecting the rights of the assessee.

14. Referring to other angle concerning payment of tax by the dealer-assessee, it was further observed as under:

We may look at the matter from another angle. If on the inputs the assessee had already paid the taxes on the basis that when the goods are utilized in the manufacture of further products as inputs thereto then the tax on these goods gets adjusted which are finished subsequently. Thus a right accrued to the assessee on the date when they paid the tax on the raw materials or the inputs and that right would continue until the facility available thereto gets worked out or until those goods existed. Therefore, it becomes clear that Section 37 of the Act does not enable the authorities concerned to make a rule which is impugned herein and, therefore, we may have no hesitation to hold that the rule cannot be applied to the goods manufactured prior to 16-3-1995 on which duty had been paid and credit facility thereto has been availed of for the purpose of manufacture of further goods.

15. The aforesaid view taken by the Hon"ble Supreme Court and also by the Division Bench of Rajasthan High Court in the case of Shankeshwar Fabrics Pvt. Ltd. (supra) do not leave any doubt that retrospective application of the amended scheme cannot defeat the accrued rights to avail Modvat Credit which in the present case have accrued to the dealer-appellant on 19-3-1998 and the amendment has come into force on 2-6-1998. The argument of Mr. Rajeev Malhotra, learned Counsel for the revenue that the procedure given in Rule 96ZH(1 & 3) was required to be followed has not impressed us because such a procedural requirement is not mandatory once there is substantial compliance with the other requirements namely that the inputs have been used in the final product then the credit could be availed either under the compounded levy scheme or under the Modvat Credit Scheme.

16. Appeal is accordingly decided in favour of the appellant.