

(2015) 10 GUJ CK 0033
In the Gujarat High Court

Case No : Misc. Civil Application (OJ) No. 199 of 2012 and Tax Appeal No. 896 of 2011

Shree Rama Multi-Tech Ltd.

APPELLANT

Vs

Commissioner of Central Excise & Customs

RESPONDENT

Date of Decision : 09-10-2015

Acts Referred:

Citation : (2016) 331 ELT 348 : (2015) 52 GST 995

Hon'ble Judges : Harsha Devani, J.B. Pardiwala and Abdullah Gulamahmed Uraizee, JJ.

Bench : Full Bench

Advocate : Paresh M. Dave, Advocate, for the Appellant; Ameer Yajnik, Advocate, for the Respondent

Judgement

Harsha Devani, J.—Rule. Ms. Ameer Yajnik, learned senior standing counsel waives service of notice of rule on behalf of the respondent. A Division Bench of this court had referred three appeals to the Larger Bench 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 Central Excise and Customs v. Biopac India Corporation Ltd., reported in 258 ELT 56 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?"

2. By a judgment dated 29.08.2012, the Larger Bench, decided the reference, wherein, in the operative part of the order, it held thus:

"20. 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."

3. By this application for review/modification, the applicant (original respondent) seeks modification of the above order dated 29.08.2012 passed by the Full Bench in Tax Appeal Nos. 2520 of 2010, 896 of 2011 and 1586 of 2010, to the extent in the operative part thereof it has observed thus: "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."

4. Mr. Paresh Dave, learned advocate for the applicant invited the attention of the court to the judgment and order under review, to point out that the Full Bench, after going through the provisions of the rules relating to CENVAT, had found that prior to the introduction of sub-rule (5C) of rule 3 of the Cenvat Credit Rules, 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. It was pointed out that it has been further held 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. Mr. Dave submitted that thus, the Full Bench has categorically held that prior to the amendment, there was no provision of reversal in the statute and that the amendment created a new right in favour of the revenue. That being so, prior to 7th September, 2007, in the absence of any provision empowering the respondents to direct reversal of credit, no such condition could be imposed in terms of rule 21 of the Central Excise Rules, 2002. Therefore, to the extent, in the operative part of its judgment, the Full Bench has circumscribed the scope of reversal by observing that for input credited prior to 7th September, 2007 there is no scope of reversal 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, the same is clearly contrary to what is held in the earlier part of the judgment.

4.1 Mr. Dave submitted that in the case of the applicant (original respondent), the Commissioner had imposed a condition of reversal of CENVAT credit, which had been challenged by the applicant before the Tribunal, and the Tribunal had

held in favour of the applicant and reversed such condition holding that the Commissioner could not have imposed a condition for reversal of credit. It was submitted that therefore, the operative part of the judgment to the extent stated hereinabove, directly concludes the issue against the petitioner and in favour of the revenue without the same having been subject matter of consideration before the Full Bench. It was urged that after considering all the rules including rule 21 of the rules, the Full Bench held that there was no provision for reversal, under the circumstances, in the operative part of the order, there is a clear conflict inasmuch as, if there is no provision for reversal, it cannot be left to the discretion of the Commissioner whether or not to impose such a condition. Reference was made to the decision of the CESTAT in the case of Collector of Central Excise and Customs v. Bhima Sahakari Sakhar Karkhana Ltd., , 1993 (68) ELT 647 (CESTAT - Bom.) , to point out that the condition envisaged in rule 49, which is in pari materia with rule 21 of the Central Excise Rules, relates to conditions, such as ordering destruction under proper supervision or other such conditions. Reference was also made to the decision of the CESTAT in the case of Girna S.S.K. Ltd. v. Collector of Customs, , 1990 taxmann.com 762 (CEGAT - Mum.) , for the proposition that the only conditions which could be contemplated are that the goods ordered to be destroyed do not go into the market for consumption and measures to ensure that object are to be prescribed by way of conditions. It was submitted that therefore, only such conditions can be imposed so as to ensure that the goods do not find their way to the market and do not create any pollution. However, in the absence of any power to direct reversal, no condition for reversal of CENVAT credit could be imposed.

4.2 On the question of maintainability of this application, the learned counsel placed reliance upon the decision of the Supreme Court in the case of Board of Control for Cricket, India and Another Vs. Netaji Cricket Club and Others, , and more particularly paragraphs 88 and 90 thereof, as well as the decision of the Supreme Court in the case of Kamlesh Verma Vs. Mayawati and Others, , for the purpose of contending that in case where there is an error apparent on record or an error of law etc., it is permissible for the court to exercise review jurisdiction to correct such error. It was, accordingly, urged that the second half of the operative part of the judgment being in conflict with the main part, the application deserves to be allowed by deleting the objectionable part from the order under review.

5. On the other hand, Ms. Amee Yajnik, learned senior standing counsel for the respondent submitted that the appeal filed by the revenue against the order passed by the Tribunal is pending consideration before the Division Bench and hence, the applicant can very well make appropriate submissions before that court in relation to the conditions imposed by the Commissioner (Appeals). Under the circumstances, there is no warrant for interference by this court.

6. As noted hereinabove, the applicant seeks modification of the order dated 29.08.2012 passed by the Full Bench to the extent, in the operative part, the

court has held that there is no scope of reversal of credit prior to September 7, 2007 if the finished product becomes unfit for human consumption, but has qualified that same by stating that 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. It may be noted that the court while deciding the reference, has categorically held 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. The court after going through the provisions of the rules relating to CENVAT, found that prior to introduction of sub-rule (5C) of rule 3 of the Cenvat Credit Rules, 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. The court further expressed the view 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. However, in the operative part, the court has held thus:

"20. 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."

7. Having regard to the fact that the Full Bench has held that prior to introduction of sub-rule (5C) of rule 3 of the Cenvat Credit Rules, there was no provision, which provided for reversal of the credit by the excise authorities where it has been lawfully taken by a manufacturer and that by way of the amendment, a new right was created in favour of the revenue, it is evident that there is clear contradiction in the second part of the operative portion of the judgment, to the extent it is held that there is no scope of reversal 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. In the opinion of this court, when the Full Bench has clearly held that prior to September 7, 2007, there was no statutory provision permitting the revenue authorities to direct reversal of credit already taken, the question of imposing any condition for reversal while granting remission of duty in terms of rule 21 of the Central Excise Rules would certainly not arise. Thus, it appears that the aforesaid part has crept in on account of inadvertent error and the same being in direct conflict with the main part of the judgment, requires to be deleted in the interest of justice.

8. Another notable aspect of the matter is that the issue as regards the nature of the conditions which can be imposed while passing an order of remission under section 21 of the Act was not subject matter of the reference, despite which the same stands decided against the applicant, which is clearly indicative of the fact that the portion of the paragraph of which deletion is sought by the applicant has crept in on account of inadvertent error, which needs to be rectified.

9. As regards the maintainability of this application for review, reference may be made to the decision of the Supreme Court in the case of Netaji Cricket Club {supra} wherein it has been held thus:

"89. Order 47 Rule 1 of the Code provides for filing an application for review. Such an application for review would be maintainable not only upon discovery of a new and important piece of evidence or when there exists an error apparent on the face of the record but also if the same is necessitated on account of some mistake or for any other sufficient reason.

90. Thus, a mistake on the part of the court which would include a mistake in the nature of the undertaking may also call for a review of the order. An application for review would also be maintainable if there exists sufficient reason therefor. What would constitute sufficient reason would depend on the facts and circumstances of the case. The words "sufficient reason" in Order 47 Rule 1 of the Code are wide enough to include a misconception of fact or law by a court or even an advocate. An application for review may be necessitated by way of invoking the doctrine "actus curiae neminem gravabit."

10. In Lily Thomas, Vs. Union of India and Others, , the Supreme Court has laid down the law in the following terms: (SCC pp. 247-48, para 52)

"52. The dictionary meaning of the word "review" is "the act of looking, offer something again with a view to correction or improvement". It cannot be denied that the review is the creation of a statute. This Court in Patel Narshi Thakershi and Others Vs. Shri Pradyumansinghji Arjunsinghji, , held that the power of review is not an inherent power. It must be conferred by law either specifically or by necessary implication. The review is also not an appeal in disguise. It cannot be denied that justice is a virtue which transcends all barriers and the rules or procedures or technicalities of law cannot stand in the way of administration of justice. Law has to bend before justice. If the Court finds that the error pointed

out in the review petition was under a mistake and the earlier judgment would not have been passed but for erroneous assumption which in fact did not exist and its perpetration shall result in a miscarriage of justice nothing would preclude the Court from rectifying the error."

11. Thus, powers of review can be exercised in rectifying an error in the earlier judgment. In the light of the above discussion, the applicant has clearly made out a case warranting exercise of review jurisdiction by this court.

12. For the foregoing reasons, the application succeeds and is, accordingly, allowed. The judgment and order dated 29.08.2012 passed by the Full Bench in Tax Appeal Nos. 2520 of 2010, 896 of 2011 and 1586 of 2010, is hereby modified by deleting the following sentence from paragraph 20 of the said judgment:

"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."

Rule is made absolute accordingly, with no order as to costs.