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(2014) 04 GUJ CK 0070

In the Gujarat High Court

Case No : Special Civil Application No. 913 of 2014

Shree Ranganatha Exports APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 17-04-2014

Acts Referred:
Central Excises and Salt Act, 1944 — Section 11B

Citation : (2014) 307 ELT 673 : (2014) 27 GSTR 440

Hon'ble Judges : Sonia Gokani, J;Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Paritosh Gupta and Paresh M. Dave, Advocate for the Appellant; R.J. Oza, Advocate for the Respondent

Judgement

Akil Abdul Hamid Kureshi, J.—Heard learned advocates for the parties for final disposal of the petition. The petition presents peculiar facts. We may, therefore, advert to the relevant facts at the outset.

2. The petitioner has challenged two orders dated May 26, 2008 and February 18, 2009--both passed by the Deputy Commissioner, Central Excise, Silvassa. Such orders pertain to the petitioner''s refund claims of Rs. 71,22,270 and Rs. 17,08,758, respectively. The petitioner has further prayed for refund of such amount.

3. The petitioner''s first refund claim of Rs. 71,22,270 met with a response from the Deputy Commissioner under his communication dated May 26, 2008, which reads as under:

"Please refer to your letter dated October 1, 2007 under which you have forwarded the refund application under rule 5 of the Cenvat Credit Rules, 2002 read with Notification No. 5/2006-CE (N.T.) , dated March 14, 2006 along with photocopies of certain documents through speed post, received by this office on May 20, 2008.

In this connection, it is to inform you that you have forwarded the following

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photocopies of the documents:

(1) ARE-1 No. 3, dated May 26, 2007.

(2) Shipping bill No. 5279323, dated May 25, 2007.

(3) Proforma invoice No. SRE/001/0708, dated April 16, 2007.

(4) Mate receipt No. 75110, dated June 14, 2007.

(5) Central excise invoice No. 3, dated May 26, 2007.

(6) Cenvat credit account input (RG 23A Pt-II) page 27/February, 2007, 29/ March, 2007, 1 and 2/April, 2007 and 4/May, 2007, 5/June, 2007 and 6/July, 2007.

(7) Cenvat stock account inputs (Form 23A Part 1) page No. 16/January 2007, 8 and 17/February 2007, 2 and 26/May 2007.

(8) Invoice No. 14/8-1-2007, 15/20-1-2007 and 16/31-1-2007 issued by M/s. Unicorn Industries, Sikkim and invoice No. 273/9-2-2007 issued by Ridhi Sidhi Paper Products, Rakholi, Silvassa.

Condition 6 of Notification No. 5/2006-CE (N.T.), dated March 14, 2006 as amended by Notification No. 13/2007-CE (N.T.), dated March 10, 2007 issued under rule 5 of the Cenvat Credit Rules, 2004 stipulated that the application in Form A along with the prescribed enclosures and the relevant extracts of the records maintained under the Central Excise Rules, 2002, Cenvat Credit Rules, 2004, or the Service Tax Rules, 1994 in original are to be filed with the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, before the expiry of the period specified in section 11B of the Central Excise Act, 1944.

In the instant case you have submitted only the photocopies of documents as stated above along with the application.

Further, it is to inform you that you have filed the refund claim of the Cenvat credit in respect of input used in the manufacture of final product which is cleared for export under bond or letter of undertaking, under Notification No. 5/2006-CE (N.T.), March 14, 2006 as amended issued under rule 5 of the Cenvat Credit Rules, 2004. In this regards, a show-cause notice for recovery of wrongly availed of Cenvat credit amounting to Rs. 5,88,24,949 has been issued by the Commissioner, Central Excise and Customs, Vapi on dated July 17, 2007 mainly on the ground that the product, viz., ''123 Brand Mouth Fresheners'' does not amount to manufacture.

Under the above circumstances, you are not eligible for refund of the Cenvat credit under Notification No. 5/2006-CE (N.T.), dated March 14, 2006 issued under rule 5 of the Cenvat Credit Rules, 2004. Therefore, the application along with photocopies of relevant documents is returned herewith."

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After receipt of the said communication dated May 26, 2008, the petitioner wrote a letter dated July 7, 2008 stating that the petitioner had received a letter summarily informing the petitioner that the authority will not consider the refund application. The petitioner contended that this stand was against the principles of natural justice. The authority should have heard the petitioner and passed an appealable order, in case the Deputy Commissioner was of the opinion that refund was not payable.

4. On January 10, 2009, the petitioner raised further a refund claim of Rs. 17,08,758. The case of the petitioner is that this refund application was never considered by the authority, at any rate there was no communication in response to the same. The case of the Department is that such refund application was replied to under the communication dated February 18, 2009 in which, the Deputy Commissioner, Central Excise, Division HI, Silvassa conveyed as under:

"Please refer to your letter Reference No. Nil, dated January 10, 2009 received by this office on February 9, 2009 on the above subject matter.

In this connection, it is to inform you that vide above-referred letter you have requested to refund of unutilised balance in the RG 23 Part II Cenvat credit for an amount of Rs. 17,08,758 consequent on surrender of registration certificate No. ACGPC8212JXM001. However, as per the existing Rules, notification issued and procedure laid down under the Central excise law, there is not such provision available for granting refund of unutilised balance lying in Cenvat credit account consequent on surrender of Central Excise Registration Certificate. Further, you have not quoted any Central Excise Rules, notification issued thereunder in support of your claim. In view of the above, in the instant case, you are not eligible for such refund of unutilised balance in the Cenvat credit account. Thus, you are hereby requested to submit your view and relevant rules/laws for entitlement of the refund application within ten days, otherwise the present letter/application dated January 10, 2009 is treated as filed and disposed thereof accordingly.

Regarding refund of Rs. 71,22,270 it is to inform you that the application along with the photocopies of relevant documents have been already returned to you vide this office letter of even number dated May 26, 2008."

5. The Department claims that such communication was forwarded to the petitioner. The case of the petitioner is that no such communication was received till the petitioner approached this court by filing Special Civil Application No. 15221 of 2013.

6. The petitioner sent reminders to the authorities for decisions on the refund claims. When the Department did not grant the refund, the petitioner filed above-mentioned Special Civil Application No. 15221 of 2013. The prayer in the said petition was for a direction to the authorities to decide the petitioner''s refund claims of Rs. 71,22,270 and Rs. 17,08,758. In such writ petition, by the judgment dated December 11, 2013, it was held and observed as under:

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"5.0 As stated hereinabove, the only relief sought in the present special civil application is to direct the respondents to decide the petitioner''s refund claims of Rs. 71,22,270 (claim dated October 1, 2007--annexure A) and that of Rs. 17,08,758 (claim dated January 10, 2009--annexure F) in accordance with law. From the communication dated May 26, 2008, it can safely be communicated that it is a communication by the Deputy Commissioner, Central Excise, Division III, Silvassa to the petitioner rejecting the refund applications on the ground that only photocopies of the documents mentioned in the said communication have been produced along with the application and also on the ground that with respect to the very same Cenvat credit, show-cause notice for recovery of wrongful availment of the Cenvat credit amounting to Rs. 5,88,24,949 has been issued by the Commissioner, Central Excise and Customs, Vapi dated July 17, 2007 mainly on the ground that the product, viz., ''123 Brand Mouth Fresheners'' does not amount to manufacture. In the said communication, it is specifically mentioned that ''under the circumstances, you are not eligible for the refund of the Cenvat credit under Notification No. 5/2006-CE (N.T.), dated March 14, 2006 issued under rule 5 of the Cenvat Credit Rules, 2004. Therefore, the application along with photocopies of relevant documents is returned herewith''. Under the circumstances, in view of the aforesaid communication dated May 26, 2008, no further order is required to be passed, as it can be said that the refund applications of the petitioner are as such decided. Under the circumstances, when it can be said that by communication dated May 26, 2008, the refund application of the petitioner for Cenvat credit have been rejected, there is no question of again directing the respondents to decide the refund applications. As stated hereinabove, no other reliefs have been sought. Even communication dated May 26, 2008 holding that the petitioner is not eligible for the refund of the Cenvat credit, is also not under challenge.

6.0 In view of the above, the present special civil application is disposed of, as no further order is required to be passed. However, it is observed that it will be open for the petitioner to challenge the communication and/or decision dated May 26, 2008 issued by the Deputy Commissioner, Central Excise, Division III, Silvassa holding that the petitioner is not eligible for the refund of the Cenvat credit and/ or for directing the Commissioner, Central Excise, Vapi to adjudicate and finally decide and dispose of the show-cause notice dated July 17, 2007 issued by the Commissioner, Central Excise and Customs, Vapi for recovery of the wrongful availment of the Cenvat credit and/or for any other appropriate reliefs, in appropriate proceedings and as and when such proceedings are initiated, the same be considered in accordance with law and on merits, as this court has not gone into the merits of the claims of the refund applications of Cenvat credit. With this, present special civil application is disposed of."

7. Three things emerge from this judgment of the High Court. Firstly, that the petitioner had approached with a prayer for direction to decide the refund applications. Secondly, the court held that the communication dated May 26, 2008 was nothing but the rejection of the petitioner''s refund claim and that

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therefore, no direction, as prayed for, is required to be granted and lastly, the court observed that it would be open for the petitioner to challenge the communication and/or the decision dated May 26, 2008 issued by the Deputy Commissioner, Central Excise, Division in, Silvassa holding that the petitioner is not eligible for refund of the Cenvat credit and/or for directing the Commissioner, Central Excise, Vapi to adjudicate and finally decide and dispose of the show-cause notice dated July 17, 2007. The petitioner thereupon filed this fresh petition in which the petitioner has prayed for quashing of the said orders dated May 26, 2008 and August 18, 2009.

8. The learned counsel, Shri R.J. Oza for the Department, strongly opposed the prayers made in this petition contending that in the earlier around of litigation, this court had already given certain direction and therefore, entertaining this petition would be contrary to such directions. He submitted that the Deputy Commissioner had taken a decision on two grounds, viz., that necessary documents were not filed along with the refund claim applications and secondly, that the petitioner had wrongly availed of the Cenvat credit, for which show-cause notice was issued and was pending.

9. On the other hand, learned counsel, Shri Gupta for the petitioner, submitted that the petitioner was all along under the bona fide belief that the Deputy Commissioner had not rejected the petitioner''s refund claims. The petitioner was, therefore, agitating before the said authority for passing an order, which could be appealed against, if it was adverse. In any case, this court granted liberty to challenge the order of Deputy Commissioner in accordance with law.

10. To our mind, certain things are very clear. On May 26, 2008, the Deputy Commissioner replied to the petitioner''s first refund claim of Rs. 71,22,270 stating that the petitioner was not eligible for refund. He finally conveyed that, "... therefore, the application along with photocopies of relevant documents is returned herewith." His order was based on two considerations--first, that the petitioner had supplied photocopies of certain documents and not the originals. Secondly, that the refund claim was with respect to Cenvat credit in respect of input used in the manufacture of final product and in regard to which, a show-cause notice for recovery of wrongly availed of Cenvat credit amounting to Rs. 5,88,24,949 had been issued by the Commissioner of Central Excise and Customs, Vapi, dated July 17, 2007.

11. Likewise, in the communication dated February 18, 2009, in response to the refund claim of Rs. 17,08,758, the Deputy Commissioner conveyed to the petitioner to submit his views and relevant rules/laws for entitlement of the refund application within ten days, foiling which, the application dated January 10, 2009 would be treated as filed and disposed of. He reiterated that the petitioner''s application for refund claim of Rs. 71,22,270 had already been returned along with all photocopies of relevant documents. There is a serious dispute about the petitioner having received such communication. Though the Department contended that the same was forwarded, the mode of dispatch and

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the proof of actual service on the petitioner is not on the record.

12. As noted earlier, the petitioner perceived the communication dated May 26, 2008 as a communication returning the petitioner''s application for refund and did not consider it as an order rejecting the refund claim. It is only when the petitioner approached this court by filing Special Civil Application No. 15221 of 2013 making a prayer for a decision on the refund claims that the court clarified the position and held that the communication dated May 26, 2008 was an order rejecting the petitioner''s refund application and that therefore, there was no further need to give any direction to decide such application. Even while so doing the court kept the liberty open for the petitioner to challenge the said order in accordance with law. By no process of law, can we shut out the petitioner''s right to challenge the decision of the Deputy Commissioner to reject the petitioner''s refund claim, though stoutly opposed by the learned counsel for the Revenue. The petitioner had a bona fide belief may be erroneously held that the communication dated May 26, 2008 was not an order rejecting his refund claim. In our view, the petitioner could bona fide hold such a belief, though as held by this court, such a belief was erroneous. Firstly, because the Deputy Commissioner returned the application along with annexed documents to the petitioner. In our experience, when the authority decides to reject the refund application, we have never come across an incident where the application itself is returned. Secondly, the normal procedure is to issue show-cause notice why such refund application should not be rejected before the final decision is taken. All quasi-judicial orders passed by the Deputy Commissioners which are appealable also come with format specifying that the order is appealable, the period within which such appeal could be filed and the appellate authority before which the appeal could lie. In the present case, admittedly no such steps were taken by the Deputy Commissioner. He summarily disposed of the petitioner''s refund application by returning the application and the annexures accompanying it. If, therefore, the petitioner held a honest belief that his application was not rejected but only returned and he, therefore, pursued the cause with the said authority, we see no lack of bona fide on his part. The petitioner, therefore, requested the Deputy Commissioner to pass an order, after hearing him, which he can appeal against, if the Deputy Commissioner was of the opinion that the refund claim was to be rejected. At no stage, the Deputy Commissioner in response to the petitioner''s communications conveyed to him that his refund application is already rejected and there is no scope of any further decision. Now that the situation has been clarified by this court, the petitioner would have a right in law to question such a decision rendered by the Deputy Commissioner on all legal aspects available to him. The same position would obtain with respect to the subsequent communication dated February 18, 2009 pertaining to the later refund claim of Rs. 17,08,758. Additionally as recorded, the Department has not produced any proof of service of the communication dated August 19, 2009. In such communication, the petitioner was granted ten days to clarify how refund could be granted when the Commissioner has issued show-cause notice as to

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why the wrongly taken Cenvat credit not be withdrawn; failing which the application shall stand rejected. When such a communication was not served on the petitioner, he obviously could not respond to the same within ten days as granted, or any time thereafter.

13. Adverting our attention to the legality of the said orders passed by the Deputy Commissioner, we may recall that such orders were passed without any notice to the petitioner. The first order dated May 26, 2008 was passed without a show-cause notice as to why the refund claim should not be rejected. Secondly, it is based on Deputy Commissioner''s belief that the petitioner had wrongly availed of Cenvat credit. For such purpose, the Commissioner of Central Excise, Vapi had already issued a show-cause notice dated July 17, 2007 and such proceedings were pending. Therefore, to press in service, the element of wrongful availment of Cenvat credit for rejecting a refund claim, an issue which was still to be adjudicated, in our opinion, was wholly wrong.

14. These observations would apply mutatis mutandis with respect to the subsequent communication dated August 18, 2009 where also this was the main basis for rejection of the claim. Under the circumstances, we are of the opinion that the said two orders of the Deputy Commissioner are required to be quashed and the matter is required to be placed back before the said authority for fresh consideration, after giving reasonable opportunity of being heard to the petitioner.

15. In the peculiar facts of this case, we would direct the Deputy Commissioner, Central Excise, Division III, Silvassa to decide such refund applications only after the Commissioner, Central Excise, Vapi, taken a decision on the show-cause notice dated July 17, 2007.

16. We were informed by the learned counsel for the Revenue that because of pending litigation before the Supreme Court, the Commissioner of Central Excise, Vapi has not yet been able to take a final decision on the said show-cause notice. At least, once the decision is rendered by the Supreme Court, the Commissioner would be expected to conclude such proceedings without any further delay. Writ petition stands disposed of.

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