
(2004) 06 GUJ CK 0009

In the Gujarat High Court

Case No : Special Civil Application No. 3198 of 2004

Shyam Textile Mills

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 28-06-2004

Acts Referred:

Citation : (2005) 100 ECC 524

Hon'ble Judges : M.S. Shah, J;D.A. Mehta, J

Bench : Division Bench

Advocate : Paresh M. Dave, for Petitioner No. 1-2, for the Appellant; Dharmishta Raval, for Respondent No. 1-3, for the Respondent

Final Decision : Allowed

Judgement

M.S. Shah, J.—Rule. Ms D.N Raval, learned Senior Standing Counsel for the Central Government waives service of Rule for the respondents.

In the facts and circumstances of the case, the petition is taken up for final disposal today.

2. The petitioner-firm had applied for refund of an amount of Rs. 1,56,251/- which came to be rejected by the Deputy Commissioner, Central Excise, Division-VI, Ahmedabad by his order dated 1.9.1999 (Ann. A). The petitioner carried the matter in appeal and the Commissioner (Appeals) by his order dated 9.1.2003 (Ann. B) set aside the impugned order of the Deputy Commissioner and allowed the appeal after giving a finding in favour of the petitioner that the petitioner was entitled to get refund of the amount claimed. Of course, the department has gone in appeal before the Customs, Excise and Service Tax Appellate Tribunal but the department has not obtained any interim stay of operation of the said order of the Commissioner (Appeals). Under the circumstances, the petitioner acted upon the said order of the Commissioner (Appeals) and utilised the amount of refund of Rs. 1,56,251/- which was lying to its credit in its deemed credit register and informed the department accordingly on 5.2.2003 (Annexure "C"). The

Assistant Commissioner, Ahmedabad has thereafter issued the impugned show cause notice dated 16.2.2004 (Annexure "E") calling upon the petitioner to show cause why the aforesaid deemed credit to the tune of Rs. 1,56,251/availed and utilised by the petitioner should not be disallowed and recovered and why interest and penalty thereon should also not be recovered from the petitioner. It is the aforesaid show cause notice which is under challenge in this petition.

3. In response to the notice, affidavit-in-reply has been filed by Dr AL Gupta, Assistant Commissioner of Central Excise, Division-IV, Ahmedabad-I opposing the petition and submitting that merely on the basis of the order of the appellate authority, the petitioner could not have suo motu utilised the amount lying to its credit in the deemed credit register. There is no provision for such suo motu refund. Secondly, it is submitted that the order of Commissioner (Appeals) is already appealed against by the department before Customs, Excise and Service Tax Appellate Tribunal.

4. We have heard Mr Paresh M. Dave, learned counsel for the petitioner and Ms D.N. Raval, learned Senior Standing Counsel for the respondents. The learned counsel have relied upon the submissions made in their respective pleadings and reiterated the same.

5. Having heard the learned counsel for the parties, we are not in a position to appreciate as to how the respondents can find fault with the petitioner's availing of the amount lying to their credit in the deemed credit register after having succeeded before the Commissioner (Appeals). The respondents appear to be harbouring a misconception that there has to be some provision under which the petitioner can take benefit of the refund only after seeking permission of the authority whose order has been set aside by the Commissioner (Appeals).

6. The second ground about pendency of the appeal before the Tribunal is also untenable because the Tribunal has not granted any stay in favour of the department and against the petitioner regarding operation of the order of the Commissioner (Appeals). The impugned show cause notice is not at all tenable and is issued by the Assistant Commissioner of Central Excise, Ahmedabad-I in defiance to the order of the Commissioner (Appeals) and cannot be countenanced. The impugned show cause notice is, therefore, without any authority of law and deserves to be quashed and set aside.

7. Accordingly, this petition is allowed and the impugned show cause notice dated 16.2.2004 is quashed and set aside.

It goes without saying that ultimately if the department succeeds before the Tribunal, the petitioner will have to refund the amount. It is also clarified that we have not gone into the merits of the controversy which is the subject matter of appeal before the Tribunal.

Rule is made absolute.