

(2015) 10 GUJ CK 0059
In the Gujarat High Court

Case No : Tax Appeal Nos. 619 and 620 to 625 of 2015

The Commissioner

APPELLANT

Vs

Thakkar Tobacco Products P. Ltd.

RESPONDENT

Date of Decision : 01-10-2015

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A(1), 11B, 3A, 3A(3)

Citation : (2016) 332 ELT 785 : (2016) 53 GST 235

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

Bench : Division Bench

Advocate : Y.N. Ravani, Advocate, for the Appellant; Paresh M. Dave, Advocate, for the Respondent

Judgement

Harsha Devani, J.—The appellant - Commissioner of Central Excise and Customs has challenged the common order dated 6th February, 2015 passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Ahmedabad (hereinafter referred to as "the Tribunal") in Appeal No. E/12449, 12450, 14001-14003, 14022-14024/2013 by proposing the following questions stated to be substantial questions of law:--

"A. Whether a manufacturer has the option to suo motu abate the duty in respect of closure of factory for a continuous period of 15 days or more without first depositing the duty?

B. Whether the Tribunal committed error in considering and correctly interpreting the provision of Rule 10 of Pan Masala Packaging Machines (Capacity Determination and Collection of Duty) Rules, 2008 by comparing it to Rule 96ZQ of Central Excise Rules?"

2. The facts stated briefly are that the respondent -assessee holds Central Excise Registration Certificate and is engaged in the manufacture of Pan Masala and Pan Masala containing tobacco commonly known as Gutkha falling under Chapter 2106-9020 and 2403-9990 respectively, of the First Schedule to the Central

Excise Tariff Act, 1985 which is brought under the Compounded Levy Scheme with effect from 1st July, 2008 as per the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 (hereinafter referred to as "the PMPM Rules") notified vide Notification dated 1st July, 2008.

3. The respondent assessee vide letter dated 24th February, 2011 intimated the Assistant Commissioner, Central Excise, Division IV, Ahmedabad-II that they had run machines as indicated therein during the month of March, 2011. The assessee by a letter dated 7th March, 2011 informed the Assistant Commissioner that they had paid duty to the tune of Rs. 238 lakhs for the month of March. Subsequently, vide letters dated 1st March, 2011 and 15th March, 2011, the assessee informed the Jurisdictional Assistant Commissioner that the machines were working from 1st March, 2011 to 4th March, 2011 and from 20th March, 2011 to 31st March, 2011, that is, for a total period of sixteen days whereas the machines were sealed for fifteen days in the month of March. It was noticed that the assessee, as per the machines run by it in the month of April, 2011, was liable to pay duty of Rs. 395 lakhs, however, for the month of April, 2011, the assessee had made payment of Rs. 2,79,83,873/- with a remark that payment was made in March, 2011 in Form No. 2 for April, 2011. The Department was accordingly of the view that the assessee had short-paid duty for the month of April, 2011 to the tune of Rs. 1,15,16,127/-. The assessee by a letter dated 6th April, 2011 claimed abatement of Rs. 1,15,16.128/- for the month of March, 2011 in April, 2011. According to the Department, in terms of the instruction of the Board dated 12th March, 2009, an abatement order has to be passed by the Jurisdictional Assistant Commissioner/Jurisdictional Deputy Commissioner, Central Excise, however, the assessee had not produced any abatement order of such Commissioner making them eligible for claiming abatement and in the absence of any such order, the assessee was not eligible for adjustment of the abatement of duty of March, 2011 for the duty liability for the month of April, 2011. Accordingly, show-cause notice was issued to the respondent assessee alleging contravention of the provisions of rule 7, rule 9 and rule 10 of the PMPM Rules on the ground that they had not paid appropriate central excise duty by due date and had wrongly taken abatement of duty and adjustment of the same towards payment of duty for the month of April, 2011. The show-notice culminated into an Order-In-Original dated 26th April, 2013 whereby the demand of Rs. 2,21,56,127/- came to be confirmed under rule 18 of the PMPM Rules read with section 11A(1) of the Central Excise Act, 1944 (hereinafter referred to as "the Act"). Penalty of Rs. 11,00,000/- came to be imposed under rule 17 of the PMPM Rules read with rule 25 of the Central Excise Rules, 2002 together with interest. The assessee carried the matter in appeal before the Tribunal. By the impugned order dated 6th February, 2015, the Tribunal has allowed the appeal and set aside the orders-in-original.

4. Mr. Y.N. Ravani, learned senior standing counsel for the appellant invited the attention of the court to the provisions of rule 10 of the PMPM Rules to submit that while rule 10 provides for abatement in case of non-production of notified

goods for the period stipulated therein, the assessee cannot, on his own, calculate the duty and set off the same against the duty payable under rule 9 in the next month. It was submitted that the Central Board of Excise and Customs has equated abatement with refund and has accordingly, by the circular dated 12th March, 2009 provided that since abatement is in the nature of refund, abatement orders are also required to be subjected to the same administrative procedure of pre and post audit as laid down by the Board from time to time regarding refund. It was pointed out that sub-section (3) of section 3A of the Act provides for abatement and that since no provision has been made in the PMPM Rules laying down the procedure for grant of abatement, the procedure as per the circular has to be followed. It was submitted that the interpretation given by the Department vide the circular dated 12th March, 2009 should be given due weightage as it gives the correct interpretation of law and should not be brushed aside lightly. It was submitted that the principle of *contemporanea expositio* guides that contemporaneous administrative construction should be given considerable weightage and should not be lightly overturned. It was submitted that the dictionary meaning of the expression "abatement" does not carry the case any further, inasmuch as, even if the meaning assigned to it is reduction of duty, even then, what is reduced has to be determined.

4.1 Referring to rule 9 of the PMPM Rules, it was contended that the rule is unambiguous and provides for making payment of duty on the 5th day of the month failing which liability starts and interest also has to be paid and that the legislature has not provided for less payment of duty in the next month. It was, accordingly, urged that rule 10 of the PMPM Rules does not absolve the assessee from payment of duty on the 5th of the month as provided by rule 9 and that there is no provision in the PMPM Rules for payment of proportionate amount of duty. According to the learned counsel, if there was an intention to provide for payment of duty after abatement, there would have been a clear provision in that regard and in absence thereof, the circular of the Department should be given due weightage. It was pointed out that rule 9 of the PMPM Rules contemplates giving information in Form-2 every month. Referring to the contents of Form-2, it was pointed out that the same does not contain any column showing abatement of duty, which clearly shows that it was the intention of the legislature that the entire duty should be paid. It was submitted that since abatement is akin to refund, section 11B of the Act would be applicable. Referring to the impugned order, it was submitted that the Tribunal has placed reliance upon decisions rendered in the context of rule 96ZQ of the Central Excise Rules, 1944 which have no relevance to the interpretation of rule 10 of the PMPM Rules, inasmuch as, rule 96ZQ cannot be compared to the present rules.

4.2 Referring to the findings recorded by the Tribunal in paragraph 8 of the impugned order, it was submitted that there is no contradiction between the two circulars referred to therein. It was submitted that both circulars pertain to different schemes and operate in different fields. Lastly, it was urged that rule 10

has not been interpreted by any High Court and since the appeals involve interpretation of the said rules, the matter requires consideration and that the appeals deserve to be admitted on the questions of law as proposed or as may be deemed fit by this court.

5. Vehemently opposing the appeals, Mr. Paresh Dave, learned counsel for the respondent assessee submitted that the submissions advanced by the learned counsel for the appellant based on the circular dated 12th March, 2009 are without any basis. It was contended that the circular nowhere provides that there has to be an order of abatement nor does it provides for any procedure to be followed by the manufacturer. The circular only provides for pre and post audit and does not lay down any procedure for granting abatement. It was submitted that the sole question that arises for consideration is as to whether any order of the Assistant Commissioner or Deputy Commissioner is required for the purpose of availing the benefit of abatement. It was contended that whenever any procedure is required to be followed for grant of abatement, specific rules have been made. In this regard the attention of the court was drawn to the fact that while rules 96ZO, 96ZQ and 96ZP of the Central Excise Rules, 1944 specifically made provision for an order of abatement to be made, the PMPM Rules are totally silent in that regard, which shows that the legislature has consciously omitted to make any such provision. It was submitted that the circular, therefore, does not supplement any omission in the rules. Referring to the proviso to section 3A(3) of the Act, it was submitted that the same is applicable to all compounded levy schemes. Referring to the 6th proviso to rule 9 of the PMPM Rules, it was pointed out that whenever the legislature has thought it fit to provide for refund, an express provision has been made in that regard. It was emphatically argued that abatement is not akin to refund and flows from the 1st proviso to section 3A(3) of the Act. It was submitted that if the legislature wanted the assessee to claim refund, it would have used the word "refund" instead of "abatement". It was argued that a plain reading of rule 10 shows that it does not lay down any condition to apply for abatement. According to the learned counsel insofar as the implementation of the circular dated 12th March, 2009 is concerned, the authorities can verify Form-2 submitted by the assessee which contains all the details of the duty paid, including the abatement availed of for the purpose of pre or post audit. It was, accordingly, submitted that both the propositions put forth on behalf of the revenue namely, that the Board's circular provides for refund in relation to abatement and that abatement is akin to refund are founded on a total misconception of law. It was submitted that the Tribunal, by a well-reasoned order, has allowed the appeal and that in the absence of any infirmity in the findings recorded by the Tribunal, the impugned order does not give rise to any question of law.

6. Before advertng to the merits of the rival contentions, reference may be made to certain statutory provisions. Section 3A of the Act makes provision for "Power of Central Government to charge excise duty on the basis of capacity of production in respect of notified goods". Sub-section (3) thereof provides that

the duty of excise on notified goods shall be levied, at such rate, on the unit of production or, as the case may be, on such factor relevant to the production, as the Central Government may, by notification in the Official Gazette, specify, and collected in such manner as may be prescribed. The proviso thereto provides that where a factory producing notified goods does not produce the notified goods during any continuous period of fifteen days or more, the duty calculated on a proportionate basis shall be abated in respect of such period if the manufacturer of such goods fulfils such conditions as may be prescribed. Thus, sub-rule (3) provides for the rate of duty and the manner in which such duty is to be collected and the proviso thereto provides for abatement of duty on a proportionate basis if the factory producing notified goods does not produce notified goods for a continuous period of fifteen days or more. Therefore, the proviso limits the collection of duty to the extent specified therein.

7. In exercise of powers conferred by sub-sections (2) and (3) of section 3A of the Act, the Central Government has framed rules called the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008. Rule 7 of the PMPM Rules provides for calculation of duty payable and lays down that duty payable for a particular month shall be calculated by application of the appropriate rate of duty specified in the notification of the Government of India dated 1st July, 2008 to the number of operating packing machines in the factory during the month. Under rule 9 of the PMPM Rules, the monthly duty payable on the notified goods is required to be paid by the 5th day of the same month. Therefore, the duty is payable in advance before the goods are actually manufactured. Thus, under the PMPM Rules, the assessee is required to calculate the duty payable each month in terms of the notification of the Government and pay the duty payable for each month on the 5th day of that month. However, when the factory does not produce notified goods for a continuous period of fifteen days or more, rule 10 of the PMPM Rules provides for abatement of duty for the period during which the factory was not producing such notified goods.

8. The controversy involved in the present case centers around the interpretation of rule 10 of the PMPM Rules, which reads thus:

"RULE 10. Abatement in case of non-production of goods.--In case a factory did not produce the notified goods during any continuous period of fifteen days or more, the duty calculated on a proportionate basis shall be abated in respect of such period provided the manufacturer of such goods files an intimation to this effect with the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, with a copy to the Superintendent of Central Excise, [at least three working days] prior to the commencement of said period, who on receipt of such intimation shall direct for sealing of all the packing machines available in the factory for the said period under the physical supervision of Superintendent of Central Excise, in the manner that these cannot be operated during the said period :

Provided that during such period, no manufacturing activity, whatsoever, in

respect of notified goods shall be undertaken and no removal of notified goods shall be effected by the manufacturer except that notified goods already produced before the commencement of said period may be removed within first two days of the said period:

Provided further that when the manufacturer intends to restart his production of notified goods, he shall inform to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, of the date from which he would restart production, whereupon the seal fixed on packing machines would be opened under the physical supervision of Superintendent of Central Excise."

9. The facts of the case are required to be examined in the light of the above statutory provisions. From the facts noted hereinabove, it is apparent that the assessee did not produce the notified goods during a continuous period of fifteen days in the month of March and accordingly claimed that it was entitled to abatement of duty on a proportionate basis for the period when the factory was not producing notified goods and accordingly adjusted duty to that extent from the duty payable in the month of April. The contention of the revenue is that abatement amounts to refund and, therefore, the procedure for availing refund as laid down under section 11B of the Act is required to be followed. In this regard, it may be noted that the expression "abatement" has not been defined anywhere in the Act or in the PMPM Rules. Therefore, the popular or dictionary meaning of the said expression is required to be looked into. In Black's Law Dictionary, the term "abatement" has been defined as a reduction, a decrease, or a diminution; the suspension or cessation, in whole or in part, of a continuing charge, such as rent. In the context of tax, abatement has been stated to be diminution or decrease in the amount of tax imposed. In the New Oxford Dictionary of English, "abatement" has been defined as the ending, reduction or lessening of something. In the Dictionary of English Language, "abatement" has been defined as an amount abated, a deduction from the full amount of tax. On the other hand, "refund" has been defined as to pay back "money" to give or to put back. Tax abatement is ordinarily known as reduction of or exemption from tax by a Government for a specific period. A tax incentive is also stated to be a form of tax abatement. Thus, the ordinary meaning of abatement is reduction, diminution and, therefore, when an assessee is entitled to abatement of duty, he is entitled to reduction of duty to that extent and not refund thereof as is sought to be contended on behalf of the revenue. It would have been a different matter if the rules prescribed for the manner in which abatement has to be granted. However, in the absence of any rule in this regard or any specific provision providing for the mode of availing abatement, the course of action adopted by the respondent assessee cannot be said to be in violation of any rule or any provision of the Act. As can be seen on a plain reading of rule 10 of the PMPM Rules, the same merely provides that in case of factory which has not produced the notified goods during a continuous period of fifteen days or more, the duty calculated on a proportionate basis shall be abated in respect of such period. The

abatement, however, is subject to the condition stipulated in rule 10, namely that, the manufacturer of such goods is required to file an intimation to that effect with the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise as the case may be, with a copy to the Superintendent of Central Excise, at least three working days prior to the commencement of such period, who on receipt of such information, is required to direct sealing of all the packing machines available in the factory for the said period under the physical supervision of Superintendent of Central Excise, in the manner that these cannot be operated during the said period. Thus, subject to the fulfillment of such conditions, rule 10 of the PMPM Rules provides that the duty calculated on a proportionate basis shall be abated.

10. Since great emphasis has been laid on the circular dated 12th March, 2009 on behalf of the appellant for contending that the principle of contemporanea expositio guides that contemporaneous administrative construction should be given considerable weight and should not be lightly overturned, it may be apposite to examine the nature of the said circular. A perusal of the circular dated 12th March, 2009 shows that the subject of such circular is "Pre and post audit of abatement orders in terms of rule 10 of the Pan Masala Packing Machine Rules, 2008 - clarification regarding". A perusal of the contents of the said circular shows that the same says that in terms of rule 10 of the PMPM Rules, the abatement of duty is to be given in case the factory did not produce notified goods during any continuous period of fifteen days or more. The JDA/JAC has to pass an abatement order in the case. The circular further says that representations have been received from field formations regarding whether the abatement orders need to be subjected to pre and post audit in the same manner as refund/rebate orders. Thus, the subject matter of the said circular is as to whether abatement orders need to be subjected to pre and post audit. The circular further says that circulars have been issued in the context of procedure to sanction pre/post audit of refund/rebate claims and as the abatement order is in the nature of refund, they are required to be subjected to the same administrative procedure of pre and post audit as laid down by the Board from time to time regarding refund. Accordingly, it has been provided that all Board circulars issued in the context of pre and post audit of refund/rebate claims will apply mutatis mutandis to the abatement orders also.

11. Thus, the said circular proceeds on the footing that abatement orders are to be passed by the JDC/JAC and accordingly provides for application of circulars issued in the context of pre and post audit in relation to refund/rebate claims to abatement orders. However, the said circular nowhere provides for the procedure to be followed for granting abatement. As noticed earlier, the Act and the PMPM Rules are totally silent as regards the manner in which the abatement is to be granted and do not speak of any order of abatement being passed by the JDC/JAC. In the opinion of this court, in the absence of the Act or the rules framed thereunder making any such provision, no such provision can be read into the Act and the rules.

12. In the above backdrop, the merits of the impugned order may be examined. The Tribunal, in the impugned order, has recorded that in none of the orders impugned before it, it is in dispute that there was a closure of the factory for more than fifteen days and the required procedure of due intimation of closure, sealing and due intimation or reopening was followed. Thus, there was no dispute that the requirements of rule 10 of the PMPM Rules had been fulfilled. There was also no dispute that the amount adjusted was not more than the amount of duty mandated to be abated in terms of rule 10 of the PMPM Rules. The Tribunal has taken note of the fact that rule 10 of the PMPM Rules does not make any stipulation about abatement having to be claimed by filing an application, though it also does not imply to the contrary. Referring to rule 9 of the PMPM Rules, it was observed that when the intention of the Government is that the amount is to be refunded and an express provision is provided therefor, whereas rule 10 does not make any such provision. It may be noted that insofar as rule 96ZO of the Central Excise Rules is concerned, sub-rule (2) thereof expressly provides for claim of abatement being made under sub-section (3) of section 3A of the Act, which would be allowed by an order passed by the Commissioner of Central Excise of such amount as may be specified in such order. Similarly, sub-rule (7) of rule 96ZQ provides for abatement being allowed by an order passed by the Commissioner of Central Excise of such amount as may be specified in such order, subject to the conditions enumerated thereunder. Similarly, sub-rule (2) of rule 96ZP provides for abatement being allowed by an order passed by a Commissioner of Central Excise of such amount as may be specified in such order subject to the fulfillment of the conditions laid down thereunder. Thus, in relation to independent processors of textile fabrics, manufacturers of non-alloy steel hot re-rolled products and manufacturers of non-alloy steel ingots, who were also assessed on the basis of annual production capacity under section 3A of the Act, there was an express provision for making an order of abatement whereas the PMPM Rules are totally silent in that regard. There is no provision for making an order of abatement under rule 10 of the PMPM Rules.

13. As noticed earlier, rule 10 of the PMPM Rules provides for abatement of duty calculated on proportionate basis in case where the factory does not produce notified goods during any continuous period of fifteen days or more. However, such abatement is subject to the conditions stipulated thereunder as referred to hereinabove. Once such conditions are satisfied, the assessee becomes entitled to abatement of duty to the extent of the days the factory did not produce the notified goods.

14. On a plain reading of rule 10 of the PMPM Rules, it is apparent that while the same provides that duty calculated on a proportionate basis shall be abated, it does not provide for any procedure for doing so. Thus, whereas rules 96ZQ, 96ZO and 96ZP of the Central Excise Rules, 1944, which also are schemes under the compounded levy scheme, there were express provisions for making an order of abatement by the Commissioner, rule 10 of the PMPM Rules is wholly silent in

that regard. Under the circumstances, having regard to the fact that rules 96ZQ, 96ZP and 96ZO provided for making an order of abatement, however, there is no corresponding provision in the PMPM Rules, it can be inferred that the rule making authority has consciously omitted making such provision. Therefore, in the absence of any specific provision for making an order of abatement, it cannot be said that the action of the assessee in calculating the duty on a proportionate basis and setting off the same against the duty payable in the succeeding month is, in any manner, violative of the rules or the statutory scheme.

15. Besides, in the light of the findings recorded by the Tribunal to the effect that it is not disputed that the adjustments made were not more than the amounts of duties mandated to be abated as per rule 10 of the PMPM Rules, the action of the respondent assessee in computing the proportionate amount of duty towards the abatement and setting it off against the duty payable in the next month does not adversely affect the revenue in any manner. The abatement, in the opinion of this court, is not akin to refund and means reduction or diminution of the duty. Therefore, when the duty stands reduced to the extent provided in the rule, there is no liability to pay the same, inasmuch as, to that extent the duty stands abated. Therefore, if the assessee has correctly calculated the proportion of duty and set off the same against the duty payable for the next month, it cannot be said that the said action is contrary to the statutory scheme. When the rules do not provide for the manner in which duty is required to be abated, nor do they provide that abatement shall be by an order of the Commissioner or any authority, but nonetheless provide for abatement of duty and the extent of entitlement to such abatement, no fault can be found in the approach of the assessee in suo motu taking the benefit of such abatement.

16. In the light of the above discussion, it cannot be said that the view adopted by the Tribunal is not a plausible view warranting interference by this court. In the absence of any infirmity in the impugned order passed by the Tribunal, it is not possible to state that the same gives rise to any question of law, much less, a substantial question of law. The appeals, therefore, fail and are accordingly dismissed.