(2010) 03 GUJ CK 0048

In the Gujarat High Court

Case No : Tax Appeal No. 695 of 2009

The Commissioner, Central Excise and Customs — APPELLANT

Vs

Welspun Gujarat Stahl Rohren Limited — RESPONDENT

Date of Decision : 03-03-2010

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11D
CENVAT (Credit) Rules, 2002 — Rule 6

Citation : (2010) 175 ECR 87

Hon'ble Judges : Harsha Devani, J;D.A. Mehta, J

Bench : Division Bench

Advocate : Darshan M. Parikh, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

D.A. Mehta, J.—Appellant revenue has proposed following three questions said to arise out of order dated 11.12.2008 made by Customs, Excise & Service Tax Appellate Tribunal (Tribunal):

1. Whether the Cestat was correct in law in not upholding the demand by the Revenue from the assessee when the assessee had in fact recovered from its buyers in an amount of 8% as excise duty, which in fact was an amount of 8% required to be paid/reversed from the Cenvat Credit on inputs already taken since the assessee had not maintained separate accounts for inputs of exempted/ non-exempted goods?

2. Whether the Cestat was correct in allowing the appeal filed by the assessee without considering the Board''s circular No. 599/36/2001 CX. Dated 12.01.2001?

3. Whether the Cestat was correct in passing order in favor of the assessee despite their failure to maintain separate accounts under Rule 6 of Cenvat Credit Rules 2002 and without paying 8% amount in terms of Section 11D?

2. Heard learned advocate appearing for the appellant. Various extracts from the

Order-in-Original made by the Adjudicating Authority were read out emphatically to submit that the Tribunal had committed an error in law so as to give rise to substantial questions of law as proposed, or as may be formulated by the Court. It was contended that in fact respondent assessee had recovered from its customers an amount of 8% of the invoice value as excise duty which was required to be paid to the exchequer in terms of Section 11D of the Central Excise Act, 1944. That the Board Circular dated 12.01.2001 had been referred to and relied upon by the Adjudicating Authority but was not considered by the Tribunal. Lastly, it was submitted that the two orders of Bangalore and New Delhi Benches of Tribunal referred to in the impugned order were wrongly relied upon by the Tribunal in the present case because in subsequent orders made by the Delhi Bench and Chennai Bench of the Tribunal a different view, i.e. a view in favour of the department, had been adopted. Learned advocate, therefore, contended that the proposed questions be formulated as substantial questions of law, after admitting the appeal.

3. Section 11D of the Act requires that every person, who is liable to pay duty under the Act or the Rules made thereunder, and has collected any amount in excess of the duty assessed or determined, from the buyer of such goods in any manner as representing duty of excise, shall forthwith pay the amount so collected to the Central Government. Hence, in the first instance it has to be found that a person is liable to pay duty under the Act; secondly, such person has collected any amount in excess of the duty assessed/determined and paid on any excisable goods under the Act from the buyer of such goods; and thirdly, the amount so collected should be representing the duty of excise. Then such person is duty bound to forthwith pay the amount so collected to the credit of the Central Government.

4. In the facts of the present case the stand of the Revenue has been stated by the Tribunal as:

...The stand of the Revenue is that the amount has been collected as excise duty whereas no duty has been paid but only "amount" as required under Cenvat Rules....

5. The Tribunal has not accepted this stand. In light of this finding it is not possible to accept the contention on behalf of the appellant that the amount had been collected as excise duty as per the findings recorded by the Adjudicating Authority in the Order-in-Original. If, there is an apparent conflict as to a finding of fact between two orders it is for the person who is alleging such conflict to seek a clarification from the superior forum. The High Court, in exercise of its jurisdiction to determine whether a substantial question of law arises, cannot be called upon to undertake an exercise to find facts and record whether finding of fact recorded by the Adjudicating Authority is correct and discard the finding recorded by the Tribunal. The only exception being a case where the order of Tribunal is challenged by specifically raising a question as to the order suffering from vice of perversity, urging the same at the time of hearing and establishing

perversity by cogent evidence in support, in light of well settled parameters in law as to perversity. The Order-in-Original in fact stands merged in the order of Tribunal and the High Court is only required to consider whether the order of Tribunal gives rise to a substantial question of law.

6. Even on facts of the present case when the order of Tribunal is read as a whole it is clear that the stand adopted by Revenue has not found favour and Tribunal has not accepted that the amount collected by respondent-assessee was duty of excise which was liable to be paid to the Central Government under provisions of Section 11D of the Act.

7. In so far as proposed Question No. 1 is concerned, the earlier part of question is suggestive in relation to a finding of fact and hence, cannot be termed to be a question of law, much less a substantial question of law.

8. Similarly, proposed Question No. 2 merely raises an issue as to whether the Tribunal was justified in allowing appeal filed by the assessee without considering the circular referred to in the question. There is nothing on record to suggest that the representative appearing on behalf of the Revenue before the Tribunal pressed the circular in service before Tribunal and yet the Tribunal did not consider the same. Merely because the Adjudicating Authority has referred to the circular in its order does not necessarily mean that the superior forum is required to consider everything that is stated in the order of the Adjudicating Authority. An appellate authority is required to only decide issues raised before it not only by way of the memorandum but those that may be urged at the time of hearing. In the present case Revenue was the respondent in appeal and if any particular aspect of the matter was required to be urged before Tribunal the representative of the Revenue was duty bound to point out the same to the Tribunal, more so when the order made by the Adjudicating Authority was under challenge.

9. In so far as proposed Question No. 3 is concerned, there is no requirement under Rule 6 of the Cenvat Credit Rules, 2002, and no other provision is pointed out obliging the Tribunal to pass an order in favour of the Revenue merely because the assessee has failed to maintain separate accounts. The frame of the questions, therefore, leaves a lot to be desired. The latter part of the question is also a suggestive statement of fact in absence of any finding which would oblige the assessee to discharge any liability under provisions of Section 11D of the Act.

10. The Court also does not find any other question so as to treat the same as a substantial question of law arising out of impugned order of Tribunal.

11. The appeal is accordingly dismissed.

