

(2010) 03 P&H CK 0305
In the Punjab And Haryana At Chandigarh

Vasu Knitwear

APPELLANT

Vs

Commissioner of Central Excise and Another

RESPONDENT

Date of Decision : 04-03-2010

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A

Citation : (2010) 177 ECR 81 : (2010) 26 STT 120

Hon'ble Judges : Mehinder Singh Sullar, J; Ashutosh Mohunta, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Mehinder Singh Sullar, J.—As common questions of law and facts are involved in both the aforementioned appeals filed by the appellant-assessee M/s Vasu Knitwear (for brevity "the assessee"), therefore, we propose to decide the same, vide this single judgment, in order to avoid the repetition. However, for facilitation, the facts have been extracted from CEA No. 175 of 2006 titled as Vasu Knitwear v. Commissioner of Central Excise, Ludhiana and Anr.

2. The crux of the facts, culminating in the commencement of, relevant for disposal of the present appeals and emanating from the record, is that the assessee was engaged in manufacture of Knitted Fabrics and Garments. During the course of scrutiny of the returns for the quarter ending June, 2003 and Cenvat return for the month of April, 2003, it revealed that the assessee availed the deemed Cenvat credit under Rule 9A(3) of the Cenvat Credit Rules, 2002 (for short "the Rules"), as per Notification No. 35/2003-CE dated 10.4.2003, in respect of the goods lying in stock as on 31.3.2003. In response to a query of the concerned department, the assessee, vide their calculation sheet dated 20.4.2004, provided the details of credit availed by it. On examination of the calculation sheet, again it revealed to the authority that the assessee has availed the excess Cenvat credit. Consequently, a show cause notice was issued as to why the Cenvat credit claimed by the assessee be not recovered alongwith appropriate interest under Rule 12 of the Rules read with Section 11A of the

Central Excise Act, 1944 (hereinafter to be referred as "the Act") and penal action under Rule 13 be not taken against it for the contravention of Rules 3 and 9A of the Rules.

3. In the wake of notice, the assessee filed the reply explaining therein that it (assessee) correctly claimed the Cenvat credit under Rule 9A (3) of the Rules under Serial No. 1(c) of Notification No. 35/2003-CE dated 10.4.2003, much prior to its subsequent amendment, vide notification No. 47/2003-CE dated 17.5.2003.. Therefore, the subsequent amendment cannot be made applicable retrospectively.

4. The explanation put forth by the assessee did not find favour and the Assessing Authority dis-allowed the Cenvat credit, ordered its recovery alongwith interest and imposed a penalty, vide impugned order dated 20.1.2005 (Annexure P2).

5. Aggrieved by the order (Annexure P2), the assessee filed the appeal, which was dismissed by the Commissioner (Appeals), Central Excise, Ludhiana, vide order dated 28.4.2005 (Annexure P3).

6. Again aggrieved by the orders (Annexures P2 and P3), the assessee filed the appeals before the Customs, Excise and Service Tax Appellate Tribunal. The Tribunal upheld the impugned orders to the extent of demand of duty of credit on inputs availed in excess of the calculations as envisaged under Notification No. 47/2003-CE dated 17.5.2003, but the imposition of penalty was set aside, vide order dated 15.2.2006 (Annexure P4).

7. The assessee still did not feel satisfied with the impugned orders and filed the present appeal.

8. Assailing the impugned orders, the learned Counsel has vehemently argued that the assessee has rightly availed the Cenvat credit, as per Rule 9A of the Rules read with Serial No. 1(c) of Notification No. 35/2003-CE dated 10.4.2003. The argument is that the subsequent amendment of the said notification, vide Notification No. 47/2003-CE dated 17.5.2003 cannot be made applicable retrospectively. Therefore, the authorities below fell in legal error and illegally rejected its claim in this relevant connection.

9. Hailing the impugned orders, on the contrary, learned Counsel for the revenue has contended that since the notification No. 35/2003-CE dated 10.4.2003 stands substituted by a subsequent notification No. 47/2003-CE dated 17.5.2003, so the amendment would operate retrospectively and the authorities below have rightly calculated the amount of Cenvat credit, in view of the subsequent notification and no interference is called for in this regard.

10. Having regard to the rival contentions of the learned Counsel for the parties, we are of the considered view that the impugned orders cannot legally be sustained and the present appeals deserve to be accepted.

11. It is not a matter of dispute that the Tribunal has negated the claim of the assessee only on the ground that the provisions of subsequent amendment of notification No. 47/2003-CE dated 17.5.2003 would operate retrospectively.

12. Again, it is a matter of fact that the assessee availed the Cenvat credit in terms of the provisions of Rule 9A of the Rules, which is reproduced as under:

9A. Transitional provisions for Textile and Textile Articles.

(1) A manufacturer, producer, first stage dealer or second stage dealer of yarn and unprocessed fabrics falling under Chapters 50, 51, 52, 53, 54, 55, 58, 59 or 60 of the First Schedule to the Tariff Act or a manufacturer of processed fabrics falling under Chapter 50, 51, 52, 53, 54, 55, 58, 59 or 60 of the First schedule to the Tariff Act shall be entitled to avail credit equal to the duty paid on inputs of such finished product, lying in stock or in process or contained in finished products lying in stock as on 31st day of March, 2003 upon making a written declaration of the description, quantity and value of the stock of inputs (Whether lying in stock or in process or contained in finished products lying in stock) and subject to availability of the document evidencing actual payment of duty thereon.

(2) Notwithstanding anything contained in sub-rule(1), the manufacturer, producer, first stage dealer or second stage dealer, as the case may be, referred to in the said sub-rule, who is unable to produce the document evidencing actual payment of duty, shall be entitled to avail credit, calculated in a manner referred to in sub rule (3), on inputs falling under Chapters 50 to 63 of the First Schedule to the Tariff Act, lying in stock or in process or contained in finished products lying in stock as on 31st day of March, 2003 upon making a written declaration of the description, quantity and value of the stock of each of such goods. The declaration made under this sub-rule shall exclude quantity of stock declared under Sub-rule (1).

(3)(a) The credit of duty on each such input lying in stock or in process shall be calculated on the basis of such rate as may be notified by the Central Government in this behalf, having regard to the average price of such inputs, and the applicable rate of duty and the quantity of input as declared by the assessee under sub-Rule(2).

(b) The credit of duty on inputs contained in the fabrics lying in stock as on the 31st day of March, 2003 shall be calculated in the following manner, namely:

(i) Where the inputs and the finished products are covered under Notification No. 52/2001-Central Excise (NT) dated the 29th June, 2001, subject to such conditions as prescribed under the said notification, the credit shall be equal to such rate of credit as may be notified by the Central Government in this behalf, multiplied by the quantity of such finished product as declared by the assessee; or

(ii) Where the inputs and the finished products are covered under Notification No.

54/2001-Central Excise (NT) dated the 29th June, 2001, or 6/2002-Central Excise (NT) dated the 1st March 2002, subject to such conditions as prescribed under the said notifications, the credit shall be equal to the product of

(A) the applicable percentage credit in terms of the said notifications;

(B) the value of such finished product declared by the assessee; and

(C) the duty rate applicable to such final product in terms of Notification No. 7/2003-Central Excise dated 28.2.2003.

(iii) in all other cases, in such manner as may be notified by the Central Government in this behalf.

Explanation-For removal of doubts, it is hereby clarified that the entire amount of credit as eligible under Sub-rule (1) and/or (2) shall be calculated by the assessee himself who can take credit accordingly.

13. Thus, a co-joint reading of these provisions would reveal that the assessee was entitled to avail the Cenvat credit of duty on such finished products or in process or contained in finished products and one each such inputs lying in stock and in process to be calculated on the basis of such rates or such manner as may be notified by the Central Government in this behalf.

14. The Central Government, in exercise of the powers conferred by sub-rule(3) of Rule 9A of the Rules, issued Notification No. 35/2003-CE dated 10.4.2003 and declared that the amount of credit of duty as specified in Column (3) of the Table below, on inputs lying in stock or in process or in inputs contained in finished goods lying in stock, as specified in the corresponding entry in Column (2) of the said table, which is as under:

Sr.No.	Description	Amount of credit
(1)	(2)	(3)
1.	Inputs lying in stock or in process, namely:	
(a)	Texturised yarn lying Rs.18 per Kg.of Texturised yarn in stock in a composite multiplied by qty in kg. of such Mill; texturised yarn.	
(b)	Yarn other than (a) above Deemed value multiplied by the rate of duty on such yarn.	
(c)	Fabrics (unprocessed or Deemed value multiplied by the processed) rate on such fabrics.	
2.	Finished goods lying in stock namely:	
(a)	Unprocessed fabrics of Declared value multiplied by cotton not containing 26% of the rate of duty on such any other textile material; unprocessed fabrics.	
(b)	Unprocessed fabrics other Declared value multiplied by than (a) above. 60% of the rate of duty on such unprocessed fabrics.	

Explanation 1. For the purposes of this Notification, "Deemed value" shall be calculated in the following manner.

[100+rate of duty]; Explanation 2. For the purposes of this Notification, "rate of duty" shall mean the rate of duty leviable under the Central Excise Tariff Act, 1985 (5 of 1986), the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) and Additional Duties of Excise (Textile and Textile Articles) Act, 1978 (40 of 1978), as the case may be, read with any Notification,

as on the 1st day of April, 2003;

Explanation 3. -For the purposes of this Notification, "composite mill" means a manufacturer who is engaged in the processing of fabrics with the aid of power alongwith the spinning of yarn from fibres and weaving or knitting or crocheting of fabrics within the same factory and includes a multi locational composite mill, i.e. a public limited company which is engaged in the processing of fabrics with the aid of power alongwith the spinning of yarn from fibres and weaving or knitting or corcheting of fabrics in one or more factories owned by the same public limited company.

15. As is evident from the record that the assessee availed the credit under Rule 9A(3) of the Rules and as per entry at serial No. 1(c) of the said notification. No doubt, the said notification was subsequently amended, vide another notification No. 47/2003-CE dated 17.5.2003 and serial No. 2 of the Table was amended as under:

2. Finished goods lying in stock, namely:

(a) Unprocessed fabrics of cotton not Declared value multiplied by 26% containing any other textile material; of the rate of duty on such unprocessed fabrics.

Declared value multiplied by 60% (b) Unprocessed fabrics other than (a) of the rate of duty on such above; unprocessed fabrics.

(c) Yarns, which were eligible for Deemed value multiplied by the exemption, as on 31st March, 2003, from rate of duty on such yarn. the whole of the excise duty under Notification No.6/2002, Central Excise, dated the 1st March, 2002 (other than the shoddy yarn purchased or procured from outside the factory, and subjected to any process);

(d) Article of apparel and clothing Declared value multiplied by 12% accessories falling under Chapter 61. of the rate of duty on such article of apparel and clothing accessories.

16. The argument of learned Counsel for the revenue that since the amount of cenvat credit is required to be calculated as per the amended provisions of Notification No. 47/2003-CE dated 17.5.2003, so the assessee availed the same in excess, is not only devoid of merit but misplaced as well, because entry at Serial No. 2 of the Table was only substituted on 17.5.2003, much after the availing of the cenvat credit by the assessee on inputs lying in stock as on 31.3.2003.

17. There is another aspect of the matter, which can be viewed from a different angle. As indicated earlier, admittedly, the assessee availed the cenvat credit on inputs lying in stock as on 31.3.2003 under Rule 9A(3) of the Rules. It means, a valuable right had already been accrued to and availed by the assessee. It is now well settled proposition of law that such benefit already granted to the assessee

cannot possibly be withdrawn by applying the subsequent amendment retrospectively. If the intention of the authority was to apply the subsequent amendment retrospectively, then it ought to have been specifically mentioned that it will operate retrospectively. In the absence of the same, such amendment would operate prospectively. Moreover, the benefit already granted to the assessee under the statutory Rule 9A(3) cannot be taken away by issuance of notification by the subordinate legislation, because the subordinate legislation has neither any power nor jurisdiction to issue such notification with retrospective effect withdrawing the benefit already accrued and availed by it (assessee).

18. Thus, seen from any angle, we are of the considered view that the assessee is entitled to avail the cenvat credit under the provisions of Rule 9A(3) of the Rules read with Notification No. 35/2003-CE dated 10.4.2003 and the rates specified by the subsequent notification No. 47/2003-CE dated 17.5.2003 would not operate retrospectively, particularly when it (assessee) had already availed the cenvat credit on the inputs lying in stock as on 31.3.2003. The authorities below appear to have committed a legal error in this relevant connection.

19. In the light of and for the reasons recorded above, the present appeals are hereby accepted and the impugned orders (Annexures P2 to P4) are set aside accordingly.