(2011) 03 GUJ CK 0033

Gujarat High Court

Case No: Special Civil Application No. 9913 of 2002

Baroda Rayon Corporation Ltd.	APPELLANT
Vs	
Union of India and Others	RESPONDENT

Date of Decision: March 14, 2011

Acts Referred:

- Central Sales Tax Act, 1956 - Section 8(4)
- Constitution of India, 1950 - Article 226
- Customs Tariff Act, 1975 - Section 3
- Income Tax Act, 1961 - Section 127

Citation: (2013) 20 GSTR 616

Hon'ble Judges: Harsha Devani, J; H.B. Antani, J

Bench: Division Bench

Advocate: Mihir H. Joshi, for the Appellant; D.N. Patel for Respondent No. 1 and Gaurang H. Bhatt, for the Respondent

Judgement

Harsha Devani, J.

By this petition under article 226 of the Constitution of India, the petitioner has challenged Central Excise Notification No. 16/1994-(N.T.), dated March 30, 1994 to the extent it provides that on the basis of the documents stipulated therein, credit under rule 57G of the Central Excise Rules, 1944 (the Rules) has to be taken on or before June 30, 1994. The petitioner has also challenged the order dated November 23, 2001 passed by the Customs, Excise and Gold (Control) Appellate Tribunal (the Tribunal). The petitioner, a limited company, is engaged, inter alia, in the manufacture of artificial filament yarn/partially oriented yam falling under Chapter 54 of the Central Excise Tariff Act, 1985. The petitioner availed of Modvat credit in respect of corrugated boxes/heat transfer oil by making necessary entries in RG-23A Part I Register and thereafter took such credit by making entries in the RG-23A Part II Register. A show-cause notice came to be issued to the petitioner on the ground that the gate passes on the basis of which Modvat credit was availed of by the

petitioner were valid documents for the purpose of Modvat only if the same had been issued before April 1, 1994 and credit under the Rules had been taken on or before June 30, 1994 as per Notification No. 16/1994 dated April 30, 1994. The Modvat credit that had been availed of after the said date was liable to be recovered along with appropriate penalty as prescribed under rule 173Q of the Rules. The details of the show-cause notice were as under:

(i) Show-cause notice dated February 20, 1995 demanding duty of Rs. 44,712 on the ground that Modvat credit had been taken on August 2, 1994.

(ii) Show-cause notice dated February 2, 1995 demanding duty of Rs. 35,728 on the ground that Modvat credit had been taken on August 3, 1994.

(iii) Show-cause notice dated February 1, 1995 demanding duty of Rs. 37,646 on the ground that Modvat credit had been taken on July 27, 1994.

2. The aforesaid show-cause notices came to be confirmed by the Assistant Commissioner of Central Excise, Division I, Surat vide three orders-in-original dated August 9, 1995 holding, inter alia, that since the petitioner had taken Modvat credit on the gate passes after June 30, 1994, in view of the above referred notification, Modvat credit had been wrongly availed of by the petitioner and was liable to be recovered. The petitioner carried the aforesaid orders-in-appeal before the Commissioner of Central Excise (Appeals) who upheld the orders but on the ground that since the gate passes had not been defaced as required under rule 57G(4) of the Rules, it was not possible to allow credit at the appeal stage on the basis of an undefaced document. Being aggrieved, the petitioner preferred an appeal before the Tribunal, who vide the impugned order held that in terms of Notification No. 16/1994, the credit taken by the petitioner after June 30, 1994 was not admissible to it as per the decision of the Tribunal in the case of 2002 (79) ECC 350 as well as the decision of this High Court in the case of CCE v. Gujarat Medi-craft P. Ltd. [2001] 42 RLT 475 (Guj). The petitioner thereafter moved an application for rectification of mistake before the Tribunal contending that the decision of the Gujarat High Court in the case of CCE v. Gujarat Medi-craft P. Ltd. [2001] 42 RLT 475 (Guj) related to endorsed gate passes while in the present case the gate passes were received directly from the supplier/manufacturer. The application came to be turned down by the Tribunal vide the order dated July 4, 2002 holding that the Tribunal''s final order was based on the decision of the larger Bench in the case of 2002 (79) ECC 350 , hence, no mistake had arisen from the final order. Being aggrieved, the petitioner has approached this court seeking the reliefs noted hereinabove.

3. Mr. Mihir Joshi, learned senior advocate appearing on behalf of the petitioner invited attention to the provisions of rule 57G of the Rules and more particularly to the proviso thereto which provides that no credit shall be taken unless the inputs are received in the factory under the cover of an invoice issued under rule 52A, an A.R. 1 or triplicate copy of a bill of entry, a certificate issued by an appraiser of

customs posted in foreign post office or any other document as may be prescribed by the Central Government by notification in the Official Gazette in this behalf evidencing the payment of duty on such inputs. It was submitted that rule 57G empowers the Central Government to prescribe any other document evidencing the payment of duty on such inputs received in the factory of the manufacturer. However, the same does not empower the Central Government to frame a rule prescribing a time limit within which credit has to be taken. Thus, the prescription of time limit is clearly beyond jurisdiction and beyond the power delegated to the Central Government under rule 57G of the Rules. Inviting attention to the decision of this High Court in the case of CCE v. Gujarat Medicraft P. Ltd. [2001] 42 RLT 475 (Guj) on which reliance had been placed upon by the Tribunal while holding against the petitioner, it was submitted that the said decision was rendered in a different set of facts wherein the dispute was as to whether if the gate passes were issued before April 1, 1994 but subsequently endorsed during the period between April 1, 1994 and June 30, 1994, the assessee could be given the benefit of the Modvat Scheme. It was submitted that when the issue involved in the present case was not covered by the decision of the High Court, the Tribunal was not justified in placing reliance upon the same while dismissing the appeal filed by the petitioner.

4. The learned counsel next contended that once inputs have been received in the factory, there is an indefeasible right to avail of the credit in respect of the said inputs and that, the notification prescribing a time limit for availing of the credit is contrary to the statutory provisions. Reliance was placed upon the decision of the Supreme Court in the case of Collector of Collector of Central Excise, Pune Etc. Etc. Vs. Dai Ichi Karkaria Ltd. Etc. Etc., , wherein the court had held that when credit has been validly taken, its benefit is available to the manufacturer without any limitation in time or otherwise unless the manufacturer itself chooses not to use the raw material in its final products. The credit is, therefore, indefeasible. Reliance was also placed upon the decision of the Supreme Court in the case of Eicher Motors Limited and Another Vs. Union of India and Others Etc., , for the proposition that provision for facility of credit is as good as tax paid till tax is adjusted on future goods on the basis of several commitments which would have been made by the assessees concerned.

5. Reliance was placed upon the decision of the Supreme Court in the case of Sales Tax Officer Vs. K.I. Abraham, , wherein the court in the context of section 8(4) of the Central Sales Tax Act, 1956 which held that the phrase "in the prescribed manner" in section 8(4) does not take in the time element. In other words, the section does not authorise the rule making authority to prescribe a time limit within which the declaration is to be filed by the registered dealer. It was accordingly submitted that the Central Government is empowered to prescribe the documents evidencing payment of duty but there is no authority to prescribe a time-limit within which a credit can be taken. Reliance was also placed upon the decision of the Supreme Court in the case of AIR 1972 1935 (SC) , for a similar proposition of law.

6. The learned counsel further submitted that once it is established that the inputs are duty paid, that such inputs mentioned in the duty-paying document have been received, and that the manufacturer has used them for the purpose for which they were declared, as in the instant case, Modvat credit cannot be denied to such manufacturer. It was submitted that in any case, the time limit prescribed by the subject notification for availing of Modvat credit by the manufacturer can only be directory. Lastly, it was submitted that once the relevant entries have been made in the register at the time of receiving the inputs in the factory which are used for the purpose of manufacturing the final product as stated in the relevant declaration, the Modvat credit is crystallized and the right to avail of the same becomes indefeasible and not dependent on any post-facto conditions and the action of the Department in seeking recovery/reversal of the same is illegal. It was further submitted that at the relevant time, the Act did not make any provision for lapsing of credit and that later on section 37 of the Act came to be amended by introducing clause (xxviii) which provides for lapsing, in the circumstances, an accrued right to avail of the credit could not have been treated as lapsed by the respondent-authorities.

7. Opposing the petition, Mr. Gaurang Bhatt, learned standing counsel for the respondents, submitted that the action taken by the respondents is in terms of the notification issued by the Central Government in exercise of powers conferred on it under rule 57A of the Rules and as such, there is no infirmity in the action of the respondents so as to warrant interference. It was further submitted that the Tribunal while dismissing the appeal preferred by the petitioner has placed reliance upon a decision of the jurisdictional High Court and as such, there is no infirmity in the impugned order of the Tribunal.

8. The facts are not in dispute. The petitioner received a consignment of corrugated boxes under the cover of gate passes dated March 29, 1994, March 30, 1994, March 31, 1994, March 25, 1994 and March 29, 1994, respectively on which duty was paid amounting to Rs. 44,712. With effect from April 1, 1994, the gate pass system was replaced by the invoice system. The Government of India issued Notification No. 16/1994-CE (N.T.), dated March 30, 1994 according to which a manufacturer could avail of Modvat credit on the basis of gate passes issued prior to March 31, 1994 subject to the condition that credit is taken before June 30, 1994. In the present case, the gate passes were issued before March 31, 1994 and the goods were received in the factory on various dates from March 26, 1994 to April 1, 1994 and entry was made in the RG-23A Register Part I on the same date. However, due to oversight on the part of the petitioner, credit was taken in the RG-23A Register Part II only on August 2, 1994. In view of the fact that credit had been taken after June 30, 1994, proceedings were initiated against the petitioner which culminated into a demand of Rs. 44,712 along with penalty of Rs. 500. The petitioner failed before the Commissioner (Appeals) as well as before the Tribunal. As can be seen from the impugned order of the Tribunal, the Tribunal has not discussed the merits of the case but has dismissed the appeal by placing reliance upon the decision of the

larger Bench of the Tribunal in the case of 2002 (79) ECC 350 as well as the decision of this High Court in the case of CCE v. Gujarat Medicraft P. Ltd. [2001] 42 RLT 475 (Guj).

9. The main challenge in the present petition is to Notification No. 16/1994-CE (N.T.), dated March 30, 1994. A perusal of the said notification shows that the same has been issued in exercise of powers conferred by rule 57G of the Central Excise Rules. By the said notification, the Central Government has prescribed documents specified in column (3) of the Table annexed thereto specified in the corresponding entry in column (2) of the said table for the purpose of the said rule. Item No. 12 thereunder reads thus:

Thus, by virtue of the said notification, gate pass issued under rule 52A of the Rules as it stood prior to April 1, 1994 has been prescribed as a document for the purpose of rule 57G of the Rules. However, the notification provides that the document should have been issued before April 1, 1994 and the credit under the said rule should have been taken on or before June 30, 1994. It is this part of the notification that has been assailed in the present petition.

10. Rule 57G of the Rules as it stood at the relevant time, in so far as the same is relevant for the present purpose reads thus:

57G. Procedure to be observed by the manufacturer.--(1) Every manufacturer intending to take credit of the duty paid on inputs under rule 57A, shall file a declaration with the Assistant Collector of Central Excise having jurisdiction over his factory, indicating the description of the final products, manufactured in his factory and the inputs intended to be used in each of the said final products and such other information as the said Assistant Collector may require, and obtain a dated acknowledgment of the said declaration.

(2) A manufacturer who has filed a declaration under sub-rule (1) may, after obtaining the acknowledgment aforesaid, take credit of the duty paid on the inputs received by him:

Provided that no credit shall be taken unless the inputs are received in the factory under the cover of an invoice, issued under rule 52A, an AR-1, or triplicate copy of a bill of entry, a certificate issued by an Appraiser of Customs posted in Foreign Post Office or any other document as may be prescribed by the Central Government by notification in the Official Gazette in this behalf evidencing the payment of duty on such inputs.

The subject notification has been issued in exercise of powers conferred by the first proviso to rule 57G of the Rules which provides for prescription of any other document evidencing the payment of duty on such inputs as may be prescribed by the Central Government by notification in the Official Gazette. Thus, from the language employed in the provision, it is apparent that the Central Government is

empowered to prescribe any other document in addition to the documents prescribed under the said rule evidencing the payment of duty on such inputs. However, the said power is limited to prescribing any other document in addition to the documents prescribed and does not extend to prescribing a time limit within which credit has to be taken. In other words, once such documents are prescribed, there is no further power vested in the Central Government to prescribe a time limit for taking credit. In so far as taking credit is concerned the same is governed by rule 57A of the Rules which lays down that the provisions of the said section shall apply to such finished excisable products as the Central Government may, by notification in the Official Gazette, specify in this behalf for the purpose of allowing credit of any duty of excise or additional duty u/s 3 of the Customs Tariff Act, 1975, (referred to as specified duty) as may be specified in the notification paid on the goods used in the manufacture of the said final products (referred to as the inputs). Sub-rule (2) of rule 57A provides that the credit of specified duty allowed under sub-rule (1) shall be utilised towards payment of duty of excise leviable on final products, whether under the Act or any other Act, as may be specified in the notification issued under sub-rule (1) and subject to the provisions of the said section and the conditions and restrictions, if any, specified in the said notification. Thus, the manner in which credit taken is required to be utilised is laid down under sub-rule (2) and is subject to the conditions and restrictions, if any, specified in the notification issued under sub-rule (1) of rule 57A of the Rules. Thus, if the time limit within which credit taken under sub-rule (1) of rule 57A is to be restricted, the same would have to be provided under the notification issued under rule 57A(1) of the Rules. In so far as rule 57G of the Rules is concerned, there is no power vested in the Central Government to restrict the time limit within which credit is required to be taken. To put it differently, the right to avail of credit is conferred under rule 57A of the Rules. Rule 57G only provides the procedure to be observed by the manufacturer. Thus, while exercising powers under rule 57G of the Rules, the Central Government is not empowered to curtail any right conferred under rule 57A of the Rules. In the circumstances, the impugned notification issued in exercise of powers under rule 57G of the Rules in so far as the same prescribes a time limit for taking of credit, being in excess of the powers conferred under the said rule is ultra vires the same and as such cannot be sustained to that extent.

11. Another aspect of the matter is that by curtailing the time-limit within which the credit taken is to be availed of, in effect and substance the said notification provides for lapsing of the credit that has already accrued in favour of the petitioner. In this regard it may be noted that the petition pertains to credit taken in the year 1994. At the relevant time there was no provision in the Act empowering the Central Government to frame rules providing for lapsing of credit of duty. Clause (xxviii) of sub-section (2) of section 37 of the Act, which empowers the Central Government to frame rules providing for lapsing of credit has been inserted with retrospective effect from March 16, 1995. Hence, the said provision would not be applicable to the

facts of the present case. In the circumstances, apart from the fact that rule 57G of the Rules does not empower the Central Government to prescribe a time limit for taking credit, at the relevant time the Central Government was not empowered to frame a rule providing for lapsing of the credit taken. Hence, the present case would be squarely covered by the decisions of the Supreme Court in the case of Collector of Central Excise, Pune Etc. Etc. Vs. Dai Ichi Karkaria Ltd. Etc. Etc., and in the case of Eicher Motors Limited and Another Vs. Union of India and Others Etc., . In Collector of Central Excise, Pune Etc. Etc. Vs. Dai Ichi Karkaria Ltd. Etc. Etc., , the Supreme Court in the context of rules 57A to 57J of the Central Excise Rules, 1944 has held that a manufacturer obtains credit for Central excise duty on raw material to be used by him in the production of an excisable product immediately it makes the requisite declaration and obtains an acknowledgment thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. The court held that the credit is indefeasible. In Eicher Motors Limited and Another Vs. Union of India and Others Etc., the Supreme Court held thus:

We may look at the matter from another angle. If on the inputs, the assessee had already paid the taxes on the basis that when the goods are utilised in the manufacture of further products as inputs thereto then the tax on these goods gets adjusted which are finished subsequently. Thus a right accrued to the assessee on the date when they paid the tax on the raw materials or the inputs and that right would continue until the facility available thereto gets worked out or until those goods existed. Therefore, it becomes clear that section 37 of the Act does not enable the authorities concerned to make a rule which is impugned herein and, therefore, we may have no hesitation to hold that the rule cannot be applied to the goods manufactured prior to March 16, 1995 on which duty had been paid and credit facility thereto has been availed of for the purpose of manufacture of further goods.

12. As can be seen from the impugned order of the Tribunal, the Tribunal has placed reliance upon the decision of this High Court in the case of Gujarat Medicraft P. Ltd. [2001] 42 RLT 475 (Guj) which was rendered in a different set of facts and the controversy involved in the present case was not directly in issue. The Tribunal was therefore, not justified in placing reliance upon the same. The Tribunal has also placed reliance upon an earlier decision of the Tribunal in the case of 2000 (93) ECR 239 . A perusal of the decision of the Tribunal in the case of Kusum Ingots and Alloys Ltd. [2000] 120 ELT 214 (Trib.-Delhi) [LB] shows that the same has been rendered in the context of different facts. Thus, both the decisions on which reliance has been placed upon by the Tribunal were not relevant to the facts of the present case. In view of the above discussion, the petition succeeds and is accordingly allowed. The impugned Notification No. 16/1994-CE (N.T.), dated March 30, 1994 to the extent it provides that the credit under rule 57G of the Rules has to be taken on or before June 30, 1994 being in excess of the powers conferred under rule 57G of the Rules is hereby quashed and set aside. Consequently, the impugned order dated November

23, 2001 of the Tribunal dismissing the appeal preferred by the petitioner is also set aside. Consequently, the respondents are restrained from enforcing any demand pursuant to the order of the CEGAT in Appeals Nos. E/1487, 1577, 1377/97-Mum, dated November 23, 2001. Rule is made absolute accordingly with no order as to costs.