
Commissioner of Central Excise Vs Tanschem Limited

Central Excise Appeal No. 6 of 2014

Court: Bombay High Court

Date of Decision: March 10, 2015

Acts Referred:

Central Excises and Salt Act, 1944 - Section 3

Citation: (2015) 322 ELT 87

Hon'ble Judges: S.P. Deshmukh, J.; S.C. Dharmadhikari, J.

Bench: Division Bench

Advocate: Vijay Kantharia and Jitendra B. Mishra, for the Appellant; Darius Shroff, Senior Counsel, Harsh Meghnani instructed by Thakordas Madgavkar, Advocates for the Respondent

Judgement

1. This appeal of the Revenue challenges the order passed by the Customs, Excise and Service Tax Appellate Tribunal dated 5th February, 2013.

That order has been passed in three appeals, but the Revenue is essentially aggrieved by the finding in Appeal No. E/2809/2004.

2. In this appeal by the Revenue, the Tribunal was called upon to decide the issue as to whether the Commissioner (Appeals) and the Adjudicating

Authority were right in the conclusions that they reached. The conclusions that they reached are that the Notifications which were in force at the

relevant time enabled the respondent-assessee to avail of the benefits and since the assessee has fulfilled the conditions which have been laid down

in the Notifications, there is nothing erroneous or illegal in the act of the assessee.

3. Mr. Kantharia appearing for the Revenue in support of this appeal submits that the question of law framed at page 10 paragraph 5(I) is a

substantial question of law. He would submit that in the show cause notice, there was a specific allegation that the benefit of exemption under

Notification No. 8 of 1997 was not admissible or available as that Notification was amended by Notification No. 7 of 1998 and by another

Notification which is more specifically referred in the show cause notice. Mr. Kantharia would submit that in the show cause notice, there is a

specific allegation and which is that the assessee has not paid appropriate duty as per Notification No. 8 of 1997 dated 1st August, 1997, as

amended by Notification No. 13 of 1998 dated 2nd June, 1998. In terms of this Notification, hundred per cent export-oriented undertakings can

clear the finished goods, rejected goods and waste and scrap etc. in domestic tariff area (DTA) which is manufactured wholly and of indigenous

raw material. However, by the amendment parties like the assessee are required to pay excise duty equivalent to fifty per cent of the aggregate of

customs duty leviable on like goods if imported into India. Mr. Kantharia submits there is a specific entry of fresh mushroom in customs under tariff

sub-heading No. 07.27, central excise duty as mentioned above is recoverable under Notification No. 13 of 1998 dated 2nd June, 1998, on the

clearance made in the domestic tariff area for the period January 1997 to June, 1997. Mr. Kantharia would submit that this is the precise allegation

and the Tribunal failed to take note of the same. If the conclusion is that there were several Notifications in the field and benefit of one of them

could have been availed of, then, the correctness of that conclusion requires scrutiny and verification by this Court. That is required because of the

failure of the Tribunal to note the amendment to the Notification No. 8 of 1997 relied upon by the assessee. The question, therefore, is whether the

Notification is really amended or superseded by a further Notification. The appeal, therefore, be admitted.

4. On the other hand, Mr. Shroff learned senior counsel appearing for the assessee would submit that there are concurrent findings of fact. It is

erroneous to assume that Notification No. 8 of 1997 has been amended. In that regard, he relies upon the Notification itself to urge that the

Notification clarifies that it has been amended by Notification No. 21 of 1997 dated 11th April, 1997, Notification No. 7 of 1998 dated 2nd June,

1998 and further Notifications of the year 2000 and 2002. There is no amendment to Notification No. 8 of 1997 by Notification No. 13 of 1998.

In the circumstances, the basis on which the show cause notice proceeds is erroneous. Notification No. 13 of 1998 is issued to exempt the finished

products, rejects and waste or scrap specified in the schedule to the Central Excise Tariff Act, produced or manufactured in hundred per cent

export-oriented undertaking or a free trade zone wholly from the raw materials produced or manufactured in India, from so much of the duty of

excise leviable under section 3 of the Central Excise Act as is in excess of the amount equivalent to fifty per cent of the aggregate of the duties of

the customs which would be leviable under the Customs Act, 1962 or any other law for the time being in force. Mr. Shroff would submit that this

Notification read with any other Notification is subject to the conditions mentioned therein.

5. Mr. Shroff would submit that the concurrent findings and which have been rendered specifically in relation to this show cause notice should now

be noticed by this Court. These concurrent findings are to be found in paragraphs 14 to 17 of the order-in-original. Further, while confirming the

order-in-original, the Appellate Authority viz. the Commissioner (Appeals) of Central Excise, Pune has observed that the assessee was following

Notification No. 8 of 1997 dated 1st March, 1997 and the review is based on Notification No. 13 of 1998. For the period prior to the issuance of

Notification No. 13 of 1998, it therefore, cannot be utilised so as to review the position prior to its issuance. Mr. Shroff submits that there was a

specific contention raised by the assessee viz. that this Notification No. 13 of 1998 which is operative from 2nd June, 1998, is proposed to be

applied for the period prior to 2nd June, 1998. Hence, the department's appeal must fail. It is in these circumstances that the finding of fact is

relied upon by Mr. Shroff and which finding in the appellate order is confirmed by the Tribunal. He, therefore, submits that such findings do not

raise any substantial questions of law for they are not perverse or vitiated by any error of law apparent on the face of the record.

6. With the assistance of Mr. Kantharia and Mr. Shroff we have perused the relevant part of the show cause notice. The allegations in the show

cause notice have been summarised in the submissions of Mr. Kantharia. Having perused these allegations, the Adjudicating Authority was

required to find out as to whether the exemption as claimed by the assessee under Notification No. 8 of 1997 dated 1st March, 1997, as

amended, is admissible or not. The Adjudicating Authority visited the factory of the assessee, studied the manufacturing process and obtained

details thereof. The material that was produced before the Adjudicating Authority in the form of computerised statements indicated production of

imported as well as indigenous spawn/mushrooms. There are separate records maintained and which have been perused by this authority. They

revealed that whatever mushroom produced out of imported spawn in a separate growing room has been used / put into unit containers and

ultimately the canned mushrooms have either been exported or cleared in domestic tariff area on payment of appropriate central excise duty. The

conditions of these Notifications have been extensively set out and the conclusion that is reached is that the benefits of this Notification could not

have been disallowed by the Revenue.

7. In paragraph 19 of the order-in-original, it has been mentioned as to how Notification No. 8 of 1997 dated 1st March, 1997, as amended by

Notification No. 7 of 1998, is still in force. This Notification has not been amended by Notification No. 13 of 1998.

8. The correctness of this finding was in issue before the first Appellate Authority viz. the Commissioner (Appeals) and it concurred with the

Adjudicating Authority that the assessee is producing fresh mushrooms out of indigenous raw material and clearing the same in domestic tariff area

in pursuance of sub-para (c) of paragraph 9.9 of EXIM Policy 1997 - 2002 read with Notification No. 8 of 1997 as amended. The findings in that

regard are to be found in paragraphs 6.1 and 6.2 of the order of the First Appellate Authority.

9. Since Mr. Kantharia has raised a issue and very vehemently, particularly whether the Notification of 1997 viz. Notification No. 8 of 1997 was

the applicable one or was it superseded or amended by any later Notification, we have, with the assistance of Mr. Kantharia, perused copies of

both Notifications. Notification No. 8 of 1997 is not amended by Notification No. 13 of 1998. It may have been amended by Notification No. 7

of 1998 dated 2nd June, 1998, but that is not what has been pressed into service before us. What has been pressed into service is the allegation

and in the show cause notice pertaining to the amendment to Notification No. 8 of 1997 by a Notification No. 13 of 1998. A perusal of the copy

of the 1998 Notification does not reveal that it purports to or rather amends the earlier Notification No. 8 of 1997. In the circumstances, the

Tribunal's view is that if there are Notifications and granting benefits to an assessee in force, availment under one which was more beneficial could

not be said to be an illegal or erroneous act. This finding of the Tribunal is imminently possible and given the fact situation. We do not find that the

Notification either is superseded or amended as claimed by the Revenue. In the circumstances, the finding of fact does not raise any substantial

question of law. We agree with Mr. Shroff that the said finding cannot be termed as perverse or vitiated by any error of law apparent on the face

of the record.

10. We are of the view that the appeal No. E2809/2004 has been rightly dismissed. The concurrent finding, therefore, does not raise any

substantial question of law. This appeal fails and is dismissed. We clarify that our order is restricted to the Tribunal's view with regard to the above

appeal. The order of remand passed by the Tribunal in other appeals is stated to have been given effect to by the competent authority and their

findings have been questioned in appeal by parties. Our conclusion shall not in any manner affect the outcome of these pending proceedings.