

Rinl Vs. the Commissioner of Central

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT

Decided On : May-14-2007

Judge : S Peeran, J T T.K.

Appellant : Rinl

Respondent : The Commissioner of Central

Advocate for Pet/Ap. : Mr. Paresh M. Dave

Judgement :

1. This appeal arises from OIO 10/05-06 dated 10.8.05 by which the Commissioner of Central Excise has directed the assessee to reverse credit of Rs. 4,45,61,623/-. He has imposed a penalty of Rs. 25 lakhs in terms of Rule 13 of Cenvat Credit Rules.

2. The short facts of the case are that the revenue issued show cause notice to the appellant, a PSU unit alleging that they had obtained 19 Quantity Based Advance Licences (QBAL) under Notification No.204/92-Cus dated 19.5.92 and 15 Value Based Advance Licences (VBAL) under Notification No. 203/92-Cus dated 19.5.02 for import of materials without payment of duty. They had taken credit on inputs under Rule 57A of CE Rules that have gone into the manufacture of final products exported in discharge of export obligation under the above noted licences while effecting exports and imported materials without payment of duty.

3. The department's contention is that they are not eligible to avail credit on inputs under the Notification and the Rules. The respondent's contention is that this very issue was subject matter of earlier proceedings before the Tribunal and the Tribunal by their final order No. 75-76/04 dated 2.1.04 held that they were eligible for availing the Cenvat credit on the inputs utilised in the manufacture of goods which are exported in terms of the Notification cited supra. Therefore they had retaken the credit as a consequence of the Tribunal's order. The revenue has proceeded to again issue show cause notice directing them to reverse the same which according to the appellants is barred by principles of constructive res-judicata and rely on the ratio of the following judgments. Visakhapatnam Steel Plant v. CCE 2) Shyam Textile Mills and Anr. v. UOI and Ors. 2005 (67) RLT 488 (Guj) Nestle India Ltd., v. CCE Chandigarh-II 2004 (176) ELT 314 (Tri-Del).

4. The second contention raised by the appellant is that the department has not challenged the correctness of the excess amount credit involved in the previous proceedings and their taking credit in terms of the Tribunal's final Order is justified. They also referred to the "Amnesty Scheme" notified by the Govt in January 1997 in terms of which the exporters were permitted to reverse the modvat credit on the basis of formula indicated by the Department. A Circular dated 10.1.97 was issued by the Board in this connection. Later the department clarified vide Circular dated 26.6.1997 that the exporters could have an option to reverse the modvat credit on actual basis. It is their contention that in pursuance to the amnesty scheme, the appellants calculated the actual amount of modvat credit to be reversed and requested the department to certify the amounts so reversible. The details submitted by them were duly verified and certified by the authorities. After the actual amounts of modvat credit were verified and certified by the Department, appellants sought recredit/refund of the excess credit reversed by them along with interest before the expiry of six months from the date of certification by the department.

5. It is their further contention that the amnesty scheme notified by the Department did not refer to the imports made under QBAL. However, the appellants applied the formula prescribed in the amnesty scheme for VBAL for the imports made under QBAL and reversed the credit taken on the said inputs reversing their right

to claim refund from the department. It is their submission that the confusion regarding the availment of modvat credit on inputs imported under QBAL scheme was more due to para (vi) of Notification No. 204/92 dated 19.5.92. It is their submission that there was a doubt where the restriction on the sale or transfer of the material or licence was limited only to the particular material against which the input credit was availed or there was a total ban on such sale or transfer if the input credit has been availed on any of the materials permitted for import. It is their contention that the Govt later on removed the contention by amending the Notification No. 204/92 by the issue of Notification No. 32/98 Cus dated 4.6.98 clarifying that the restriction on the sale or transfer of the material or licence applied only if the very same materials permitted for import was used for availing modvat credit. The appellants submitted that they found that they had sold the licences only in respect of the inputs on which they did not avail any modvat credit at all and consequently, the entire credit reversed by them was unnecessary. Therefore, they sought recredit/refund of the entire amount of the modvat credit reversed in respect of QBAL licences. They contend that their claims seeking refund of the modvat credit reversed by them in excess was never disputed by the department. However, they issued show cause notices, proposing to reject the refund claim on the ground that they were barred by limitation in terms of Section 11-B of CE Act and on the ground of unjust enrichment. Their replies were rejected. However, the matter came up to the Tribunal and the Tribunal by Final Order Nos. 75 & 76/04 dated 2.1.04 upheld their contention and allowed the refund claim. They submit that after the receipt of above said Final Order, they informed the department by their letter dated 20.3.04 intimated the Jurisdictional Assistant Commissioner of Central Excise that they would be taking credit on the amounts involved in the present case and took credit vide Entry No. 8108 dated 23.03.2004 themselves. The department rejected the claim and issued show cause notice confirming the amounts.

6. The appellants contention is that their taking credit of the excess reversal previously made is justified as consequential relief of the Final Orders of the Tribunal. They rely on the following judgments: Visakhapatnam Steel Plant v. CCE
7. Learned Counsel argued on the basis of this case while the DR reiterated the departmental view.

8. We have carefully considered the submissions and after due consideration, we find that the subject matter of this appeal was considered by the Final Order 75 & 76/04 dated 2.1.04. The Tribunal following the ratio of Vikarant Tyres Ltd., as per Final Order dated 1476 to 1477 dated 21.11.2003 upheld the assessee's contention and allowed their appeal. As a consequence of this appeal being allowed, they took the credit. The revenue has proceeded again to issue show cause notice. The contention of the appellants is that the issue is hit by the principles of res-judicata in terms of judgment in the case of Paro Food Products and Nestle India Ltd., (supra) is justified. In view of this position we uphold the contention that the issue is decided in assessee's favour and they were justified in retaking the credit. The Tribunal in the case of Visakhapatnam Steel Plant v. CCE (supra) in similar circumstances upheld the restoration of credit of duty in an identical case, the entire order is reproduced herein below: The Appellants are engaged in the manufacture of iron and steel products falling under Chapter 72 of the Schedule to the Central Excise Tariff Act, 1985 and had been exporting the products manufactured by them in terms of the Value Based Advance Licence (VBAL) and Quantity Based Advance Licence (QBAL) issued to them and by availing exemption from payment of Customs Duty on the inputs imported by them under the relevant Customs Notification. They had been taking Modvat credit of the duty paid on inputs, used in the manufacture.

2. In and around December, 1996 and January, 1997, the Department entertained the view that under VBAL, the exporter should not at all have taken the input credit on any of the inputs used in the export product. The Department of Revenue issued a Public Notice on 3-1-97 notifying an 'amnesty scheme' under which the exporters operating under VBAL were given an opportunity to reverse the Modvat credit availed by them on the inputs used in exported products along with interest at 20% on or before 31-1-97. To avail the benefit of the 'amnesty scheme', they reversed the Modvat credit along with interest not only against the imports made under VBAL, but also against QBAL issued during the period 1-4-92 to 31-3-95. The Appellants also requested the Assistant Commissioner to verify the amounts reversed and to issue a certificate as to the correctness of the same.

3. On a verification of the such reversals made, the appellants found, that they had reversed amount of Rs. 25,94,067/- in excess.

They vide their letter dated 20-3-97 requested the Assistant Commissioner to verify the calculations and also sought refunds of the said excess reversal. The Assistant Commissioner vide his letters dated 26-3-97 in respect of VBAL and QBAL schemes, confirmed the correctness of the calculation made by the appellants.

4. As the appellants had reversed amounts in excess of the actuals and there was no intimation from the department regarding the requests made for the re-credit of these excess amounts, they vide their letter dated 17-6-97, informed the Assistant Commissioner that they were taking credit of the excess reversal amounts made by them in their RG 23A Part II. 6. A show cause notice dated 29-10-97 was issued demanding the Appellants to reverse the credit taken back by the Appellants, on the ground that they had not taken permission from the Department and that there was no provision to take credit of that amount without following the procedure laid down in Section 11B read with Rule 173-S. The Deputy Commissioner passed the order-in-original and directed the Appellants to reverse the credit taken. On appeal the Commissioner (Appeals), Hyderabad, has upheld the order of the Deputy Commissioner. Hence this appeal.

(a) It is not in dispute that the Appellants had reversed credit in excess of what was required under the 'amnesty scheme'. It is also a fact that the Appellants did inform the Assistant Commissioner before taking the credit of the excess amounts originally reversal.

The Appellants have therefore only, restored the credit of duty available to them in accordance with the law. They have made arithmetical and accounting corrections required for the maintenance of RG 23A book, as mandated by Rule 226.

(b) Section 11B, as urged by the DR before us, has no application to -- the facts and circumstances of the present case. Since the amount reversed by debit was credit entry in Accounts and not duty and the excess was accepted by the department vide letter dated 26-3-97, admitting the over-pitched calculations,

made by the appellants.

Reversals of credit by debit entry was in pursuance of the conditions attached to Customs Notification Nos. 203/92-Cus. and 204/92-Cus. and the amnesty scheme, and had nothing whatsoever to do with payment or discharge of any duty under the Central Excise Act on the finished products. If such entries were not correct, errors and omissions which are an internationally recognized practice in accounting is not only permissible but desirable to keep accounts to be true reflection of status. E & O.E.A. operations do not require any permission or grant from the other side.

(c) There is no provision in Modvat Rules, requiring the assesseees to obtain specific permission from the Department before taking the credit of utilizing the credit so taken. All that is required is filing of declaration, receipt of inputs under a valid duty payment document, use of the inputs in or in relation to the manufacture of the final product, the clearance of the final products on payment of duty and utilizing the credit for payment of duty, except to maintain true and correct account books as per Rule 226. These corrections of the Accounting entries however, are required to be made as per Rule 226(ii) with the sanction of and in the presence of the Proper Officer. It is on record that the calculations as made have been accepted by the Assistant Commissioner vide letter dtd.

26-3-97 and thereafter it was imperative on part of the Appellants to correct the Account credit/debit entries. They have sought the refund vide letter dtd. 20-3-97. They should have been advised to correct the entry instead of taking up the issue by show cause notice etc. as in this case. A penalty at the most under Rule 226 could be imposed, for having made a cross reverse entry in contravention of Rule 226(ii). No penalty has however been arrived at or imposed by the lower authorities.

8. The order of reversal of credit as arrived at by the lower authorities considering it as a refund is therefore set aside and appeal allowed.

The Gujarat High Court in the case of Shyam Textile Mills and Anr. v.UOI and Ors. (supra) also upheld the similar contention. The judgment rendered in the case is

reproduced herein below.

Rule. Ms D.N. Raval, learned Senior Standing Counsel for the Central Government waives service of Rule for the respondents.

In the facts and circumstances of the case, the petition is taken up for final disposal today.

2. The petitioner-firm had applied for refund of an amount of Rs. 1,56,251/- which came to be rejected by the Deputy Commissioner, Central Excise, Division-VI, Ahmedabad by his order dated 1.9.1999 (Ann. A). The petitioner carried the matter in appeal and the Commissioner (Appeals) by his order dated 9.1.2003 (Ann. B) set aside the impugned order of the Deputy Commissioner and allowed the appeal after giving a finding in favour of the petitioner that the petitioner was entitled to get refund of the amount claimed. Of course, the department has gone in appeal before the Customs, Excise and Service Tax Appellate Tribunal but the department has not obtained any interim stay of operation of the said order of the Commissioner (Appeals). Under the circumstances, the petitioner acted upon the said order of the Commissioner (Appeals) and utilised the amount of refund of Rs. 1,56,251/- which was lying to its credit in its, deemed credit register and informed the department accordingly on 5.2.2003 (Annexure "C"). The Assistant Commissioner, Ahmedabad has thereafter issued the impugned show cause notice dated 16.2.2004 (Annexure "E") calling upon the petitioner to show cause why the aforesaid deemed credit to the tune of Rs. 1,56,251/- availed and utilised by the petitioner should not be disallowed and recovered and why interest and penalty thereon should also not be recovered from the petitioner. It is the aforesaid show cause notice which is under challenge in this petition.

3. In response to the notice, affidavit-in-reply has been filed by Dr A.L. Gupta, Assistant Commissioner of Central Excise, Division-N, Ahmedabad-I opposing the petitioner and submitting that merely on the basis of the order of the appellate authority, the petitioner could not, have suo motu utilised the amount lying to its credit in the deemed credit register. There is no provision for such suo motu refund. Secondly, it is submitted that the order of Commissioner (Appeals) is already appealed against by the department before Customs, Excise and Service

Tax Appellate Tribunal.

4. We have heard Mr. Paresh M. Dave, learned Counsel for the petitioner and Mr D.N. Raval, learned Senior Standing counsel for the respondents. The learned Counsel have relied upon the submissions made in their respective pleadings and reiterated the same.

5. Having heard the learned Counsel for the parties, we are not in a position to appreciate as to how the respondents can find fault with the petitioner's availing of the amount lying to their credit in the deemed credit register after having succeeded before the Commissioner (Appeals). The respondents appear to be harbouring a misconception that there has to be some provision under which the petitioner can take benefit of the refund only after seeking permission of the authority whose order has been set aside by the Commissioner (Appeals).

6. The second ground about pendency of the appeal before the Tribunal is also untenable because the Tribunal has not granted any stay in favour of the department and against the petitioner regarding operation of the order of the Commissioner (Appeals). The impugned show cause notice is not at all tenable and is issued by the Assistant Commissioner of Central Excise, Ahmedabad in defiance to the order of the Commissioner (Appeals) and cannot be countenanced. The impugned show cause notice is, therefore, without any authority of law and deserves to be quashed and set aside.

7. Accordingly, this petition is allowed and the impugned show cause notice dated 16.2.2004 is quashed and set aside.

It goes without saying that ultimately if the department succeeds before the Tribunal, the petitioner will have to refund the amount.

It is also clarified that we have not gone into the merits of the controversy which is the subject matter of appeal before the tribunal.

Both the above rulings apply to the facts of the case. We also uphold the plea raised by the appellants that even otherwise the issue is hit by time bar. All the contentions are accepted and the appeal is allowed with consequential relief if

any.

(Operative portion of the order already pronounced in open court on conclusion of the hearing)

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