

2013 (4) ECS (7) (Bom - HC)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

WRIT PETITION NO. 3956 OF 2010

**Union of India, Through
Commissioner of Central Excise,
Mumbai-I.**

.....Petitioners.

Vs.

M/s. Rainbow Silks & Anr.

.....Respondents.

Mr. M.I. Sethna, Sr. Advocate with Mr. Jitendra B. Mishra for the Petitioners.
Mr. Ashok D. Shetty for Respondent No.1.

CORAM :

**DR. D.Y. CHANDRACHUD AND
ANOOP V. MOHTA, JJ.**

DATE : JUNE 27, 2011

“Under Rule 18 of the Cenvat Credit Rules, 2002, rebate can be granted of excise duty paid on goods exported. According to the Revenue, in these cases no excise duty was as a matter of fact paid. Cenvat credit was accumulated on the basis of fraudulent documents of bogus firms and such credit was utilised to pay duty. Since there was no accumulation of Cenvat credit validly in law, there was no question of duty being paid therefrom. This submission warrants serious consideration and the Revisional Authority would have to apply its mind to it.” [Para 7]

ORAL JUDGMENT (PER DR. D.Y. CHANDRACHUD, J.):-

1. Rule, by consent, returnable forthwith. With the consent of the counsel and at their request, the Petition is taken up for hearing and final disposal.

2. These proceedings have been instituted under Article 226 of the Constitution by the Union of India to challenge an order passed by the Joint Secretary to the Government of India in purported exercise of revisional jurisdiction under Section 35EE of the Central Excise Act, 1944.
3. The First Respondent, who is a merchant exporter, filed two rebate claims in the office of the Assistant Commissioner of Central Excise (Rebate), Mumbai-I, in the amount of Rs. 1,07,989/- and Rs.2,19,109/- in respect of duty alleged to have been paid on goods manufactured by two firms by the name of Jai Krishna Prints and Jai Santoshi Tex Prints. The goods were exported through the port of Mumbai. On a scrutiny of the claims, the Department claims to have noticed that the First Respondent had submitted duty paying certificates in loose/open condition. A reference was accordingly made to the jurisdictional Central Excise authority at Surat. The Range Superintendent in the Commissionerate at Surat reported by his communication dated 10 February 2006 that the processor (Jai Krishna Prints) had taken Cenvat credit on the basis of invoices of a grey material supplier, Ganpati Textile, Surat. An alert circular had been issued by the Commissioner of Central Excise at Surat on 22 September 2005 pointing out that as many as 71 firms, including Ganpati Textile, were non-existent and bogus. A notice to show cause had been issued on 25 January 2008 to Jai Krishna Prints for the recovery of Cenvat credit, wrongly availed of. On the basis of the above reports, the rebate claims of the First Respondent were rejected on 23 March 2006 by the Assistant Commissioner. The order of the Assistant Commissioner was confirmed in Appeal by the Commissioner (Appeals). The First Respondent, thereupon filed a Revision under Section 35EE, which was disposed of by the Joint Secretary to the Government of India by an order dated 1 September 2009. The Joint Secretary, while reversing the concurrent findings, came to the conclusion that the case of the First Respondent was similar to the decision of the Revisional Authority in the case of Shyam International dated 18 May 2007, where it was held that a merchant exporter cannot be denied rebate for the reason that the manufacturer had availed of Cenvat credit wrongly on the basis of bogus documents, especially when there was no evidence to show any mutuality of interest, financial control, or flow-back of funds between the merchant exporter and the manufacturers/ suppliers of goods.
4. Counsel appearing on behalf of the Petitioner submitted that the Revisional Authority has proceeded on the basis that the case was covered by the decision in Shyam International, whereas, that is not the case. In the earlier case, the Revisional Authority had found that the transaction between the suppliers and the exporters was an arms length transaction, bonafide entered into between the two parties. As a matter of fact, the Revisional Authority had noted that if a charge in regard to want of bonafides had existed, then despite the purchase of goods by the merchant exporters on the basis of Central Excise documents/invoices

showing duty payment, the transaction would be vitiated. In the present case, it is sought to be urged, that as a matter of fact, the investigation which was conducted in the matter involving the merchant supplier had disclosed that it was the exporter, the First Respondent, who had supplied the Grey Fabrics. The statement of the partner of Jai Krishna Prints was that he had not received the Grey Fabrics directly from the dealer or manufacturer, but he had received it through the exporter.

5. On the other hand, it is urged before the Court on behalf of the First Respondent that in the present case, the goods were exported by the First Respondent. Having exported those goods, the First Respondent was entitled to a rebate. The First Respondent paid the manufacturer a composite price inclusive of duty. Counsel submitted that if there are any allegations about the want of bonafides or of wrongful availment of Cenvat credit against the manufacturer, the First Respondent should have an adequate opportunity of meeting such allegations.
6. The record before the Court, inter alia contains an alert circular which was issued by the Central Excise Commissionerate at Surat on 22 September 2005 noting that during the course of the physical verification of firms, as a part of an investigation into the grant of fraudulent rebate, 71 firms at Surat were found to be bogus and non-existent. Among them was Ganpati Textile listed at Serial No.13. On 25 January 2008 a notice to show cause was issued to Jai Krishna Prints on the allegation that it had wrongly availed of Cenvat credit on Grey Fabrics, on the basis of invoices issued by Ganpati Textile which was found to be a bogus and fictitious firm. In the notice to show cause, reliance was placed on the statement of a partner of Jai Krishna Prints, stating that he had not received Grey Fabrics directly from the said dealer/manufacturer, but that he had received it through the exporter himself. The notice to show cause culminated in an order dated 28 April 2008 of the Joint Commissioner confirming the demand in respect of the Cenvat credit wrongly availed of, penalty and interest. The order noted that the admitted position was that the unit did job work and had not received Grey Fabrics directly from the manufacturers but through the exporter. In Appeal, the Commissioner (Appeals) by an order dated 1 September 2009 modified the order. Upon a further Appeal by the department, the CESTAT remanded the matter back to the original Adjudicating Authority.
7. The reason why we have adverted to the aforesaid facts, is that the Revisional Authority proceeded on the basis that there was no allegation of a want of bonafides on the part of the First Respondent. This assumption of the Revisional Authority is erroneous because the record before the Court, indicates to the contrary. It is the contention of the Central Excise Department that the First Respondent was a party to the fraud involving the grant of rebate. The fact that

this was under investigation right from 2005 is evident from the alert circular dated 22 September 2005. In this view of the matter, the basis upon which the Joint Secretary to the Government of India allowed the claim for rebate was wholly erroneous. The Joint Secretary proceeded on the basis that the case is covered by his earlier decision in Shyam International. The distinguishing features upon which the Department places reliance would have to be considered by the Revisional Authority. Moreover, the Revisional Authority would have due regard to the parameters of the jurisdiction under Section 35EE of the Central Excise Act, 1944. The contention of the Revenue is that under Rule 18 of the Cenvat Credit Rules, 2002, rebate can be granted of excise duty paid on goods exported. According to the Revenue, in these cases no excise duty was as a matter of fact paid. Cenvat credit was accumulated on the basis of fraudulent documents of bogus firms and such credit was utilised to pay duty. Since there was no accumulation of Cenvat credit validly in law, there was no question of duty being paid therefrom. This submission warrants serious consideration and the Revisional Authority would have to apply its mind to it. In that view of the matter, we find that the approach of the Revisional Authority is unsustainable.

8. We accordingly allow the Petition by quashing and setting aside the impugned order dated 1 September, 2009 (Exhibit "D" to the Petition). We are of the view that an order of remand would be warranted in order to enable the Revisional Authority to consider afresh the Revision filed by the First Respondent against the order of the Commissioner (Appeals) confirming the rejection of the Application for rebate. There shall be an order in these terms. In the circumstances of the case, there shall be no order as to costs.