

REPORTABLE

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **WRIT PETITION (CIVIL) NO. 7033 OF 2010**

Reserved on : 11TH January, 2011.
% **Date of Decision: 14th February, 2011.**

PARSHVA OVERSEAS Petitioner
Through Mr. Rajesh Tuli, Mr. Tushar Jain, Mr.
Sanjay Sethi, Advocates.

VERSUS

JOINT SECRETARY & OTHERS Respondents
Through Mr. Satish Kumar, Advocate.

CORAM:

HON'BLE MR. JUSTICE DIPAK MISRA, THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ? YES
3. Whether the judgment should be reported YES in the Digest ?

SANJIV KHANNA, J.:

Mr. Pankaj Kumar Jain, proprietor Parshva Overseas assails the Order dated 18th February, 2010 passed by Mr. D.P. Singh, Joint Secretary, allowing the revision application filed by the Commissioner of Central Excise, Delhi-I, represented before us by the Union of India-the respondent. The relevant and operative portion of the impugned Order reads :

“8. Government further observes that para 1.5 of Part V of CBEC Excise Manual of Supplementary Instructions, 2005 stipulated as under :

“ 1.5 The benefit of input stage rebate cannot be claimed in any of the following situations. :

- (i) Where the finished goods are exported under claim for duty drawback;
- (ii)
- (iii) Where facility of input stage credit is available under Cenvat credit Rules, 2002.
- (iv)
- (v)”

9. From above, it is clear that the merchant exporter/manufacturer exporter can not claim input stage rebate claim if he chooses to avail duty drawback or input cenvat credit. This provision has been made to deny double benefit to the exporters i.e. to avail cenvat credit on the inputs utilized and also to claim input stage rebate claim on those very inputs utilized in the manufacturing/processing of the finished goods. Government policy is to relieve the burden of the input duties suffered on the exported goods to make them more competitive in the international market. Double benefit cannot be allowed to the exporter as the respondent has already taken cenvat credit on inputs and have also utilized the same for clearance of scrap.

10. Government agrees with the case laws referred by the respondent that procedural lapses may be ignored if there is a substantial proof of export of goods. But their case does not fall in that category as it will amount to granting double benefit to them.

11. In respect of the respondent plea regarding the applicability of provision of Rule 6(6)(v) of Cenvat Credit Rules, 2004, Government observes that Rule is not relevant in their case as that Rule relates to export of goods without payment of duty under Bond.

12. The respondent has placed reliance on the order No. 218 to 223-R dated 30.07.08 in the matter of M/s. Pawan Jain and Sons under which the Assistant/Deputy Commissioner has sanctioned the rebate claims on the similar matter. In this regard, Government observes that M/s. Pawan Jain and Sons vide their letter dated 18.02.09 has intimated the

Assistant Commissioner Central Excise Division I, New Delhi that they have reversed the input credit availed on account of refund/rebate claim sanctioned vide those orders. Hence, the ratio of these orders is not applicable in their case.”

2. Learned counsel for the petitioner had submitted that the impugned Order refers to/relies upon the principle of double benefit and urged that it was not the case of the Revenue that the petitioner had enjoyed double benefit. In this connection, our attention was drawn to the Order dated 8th December, 2008 passed by the Assistant Commissioner, rejecting the application of the petitioner for refund/rebate of Rs.23,62,737/-.

3. The petitioner is a manufacturer and exporter of stainless steel circles and utensils. For this purpose it purchases stainless steel coils/flats which are an input or raw product which is first converted into stainless steel circles and then in the second stage is used to manufacture stainless steel utensils. Conversion of stainless steel coils/flats into stainless steel circles attracts payment of excise duty under the Central Excise Rules, 1944 but conversion of stainless steel circles into stainless steel utensils is exempt from payment of excise duty as per Notification No.10/2003 dated 1st March, 2003. The petitioner had purchased Stainless Steel Coils/ flats from registered dealers for manufacture of stainless steel circles. Central Excise duty was paid on Stainless Steel Flats/Coils when the said raw materials were converted into stainless steel circles. The petitioner also

purchased stainless steel circles on which excise duty was paid. The duty paid on the inputs/raw material as well as manufacture of stainless steel circles was duly credited in the RG 23 part II register maintained under the provisions of Central Excise Rules.

4. Scrap was generated in the manufacture of stainless steel utensils and also at the time of conversion of Stainless Steel Flat/Coils into stainless steel circles. The scrap was sold by the petitioner in the markets in India. Purchasers of scraps were given benefit of the excise duty paid by the petitioner by debiting an amount in the Cenvat Credit account of the petitioner.

5. It is the case of the petitioner that they do not make any domestic sales and the entire production of stainless steel utensils and circles was exported. Cenvat Credit therefore was not fully utilized.

6. On 19th July, 2004, the petitioner filed a claim for refund of Cenvat Credit in proportion to the material used in the manufacture of the exempted exported product, i.e. stainless steel utensils of Rs.23,62,737/-. It was submitted that the petitioner could not utilize the Cenvat Credit and the same should be refunded as the end product was exported. The petitioner invoked Rule 18 of the Central Excise Rules, 2002 (Rules, for short) and the procedure laid down in Notification no. 41/2001 CE (NT) dated 26th June, 2001. The petitioner had on 19th January, 2004 filed an application for fixation of input output norm, which was fixed on 18th June, 2004. It may be noted here that the refund/rebate was claimed for the exports made

during the period December, 2003 till February, 2004. In these circumstances, it is not possible to agree with the contention of the petitioner that the delay in disposal of the fixation of input output norm was due to the fault of the respondent. As noticed above, the petitioner had filed the application only on 19th January, 2004. The respondent have to be given reasonable time for finalization of the said norm.

7. Rule 18 of the Rules is reproduced below:-

“Rule 18. Rebate of duty. – Where any goods are exported, the Central Government may, by notification, grant rebate of duty paid on such excisable goods or duty paid on materials used in the manufacture or processing of such goods and the rebate shall be subject to such conditions or limitations, if any, and fulfillment of such procedure, as may be specified in the notification.”

8. The notification No. 41/2001-CE(NT) dated 26th June, 2001 reads as under:

“Inputs used in manufacture/processing of export goods – Rebate of whole of duty when goods exported – Conditions and procedure

In exercise of the powers conferred by of Rule 18 of the Central Excise (No. 2) Rules 2001, the Central Government hereby directs that rebate of whole of the duty paid on excisable goods (hereinafter referred to as ‘materials’) used in the manufacture or processing of export goods shall, on their exportation out of India, to any country except Nepal and Bhutan, be paid subject to the conditions and the procedure specified hereinafter:-

(1)**Filing of declaration.** – The manufacturer or processor shall file a declaration with the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise

having jurisdiction over the factory of manufacture describing the finished goods proposed to be manufactured or proceeded along with their rate of duty leviable and manufacturing/processing formula with particular reference to quantity or proportion in which the materials are actually used as well as the quality. The declaration shall also contain the tariff classification, rate of duty paid or payable on the materials so used, both in words and figures, in relation to the finished goods to be exported;

(2) **Verification of Input-output ratio** – The Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise shall verify the correctness of the ratio of input and output mentioned in the declaration filed before commencement of export of such goods, if necessary, by calling for samples of finished goods or by inspecting such goods in the factory of manufacture or process. If, after such verification, the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise is also satisfied that there is no likelihood of evasion of duty, he may grant permission to the applicant for manufacture or processing and export of finished goods.

(3) **Procurement of material** : - The manufacturer or processor shall obtain the materials to be utilized in the manufacture of the finished goods intended for export directly from the registered factory in which such goods are produced, accompanied by an invoice under Rule 11 of the Central Excise (No. 2) Rules, 2001:
Provided that the manufacturer or processor may procure materials from dealers registered for the purposes of CENVAT Credit Rules, 2001 under invoices issued by such dealers.

(4) **Removal of materials or partially processed material for processing.** – The Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise may permit a manufacturer to remove the materials as such

or after the said materials have been partially processed during the course of manufacture or processing of finished goods to a place outside the factory:-

- (a) for the purposes of test, repairs, refining, reconditioning or carrying out any other operation necessary for the manufacture of the finished goods and return the same to his factory without payment of duty for further use in the manufacture of finished goods or remove the same without payment of duty in bond for export, provided that the waste, if any, arising in the course of such operation is also returned to the said factory of the manufacture or process; or
- (b) for the purpose of manufacture intermediate products necessary for the manufacture or processing of finished goods and return the said intermediate products to his factory for further use in the manufacture or process of finished goods without payment of duty or remove the same, without payment of duty for export, provided that the waste, if any, arising in the course of such operation is also returned to the factory of manufacturer or processor;
- (c) any waste arising from the processing of materials may be removed on payment of duty as if such waste is manufactured or processed in the factory of the manufacturer or processor;

(5) **Procedure for export.** – The goods shall be exported on the application in Form A.R.E.2 specified in the Annexure and the procedures specified in Ministry of Finance (Department of Revenue) notification No. 40/2001 – Central Excise (N.T.), dated 26th June, 2001 or in notification No. 42/2001 – Central Excise dated 26th June, 2001 shall be followed.

(6) **Presentation of claim of rebate** – The claim for rebate of duty paid on materials used in the manufacture or processing of goods shall be lodged only with the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise having jurisdiction of the place

approved for manufacture or processing of such export goods.”

9. Form ARE-2 is a part of the said notification. The heading of the ARE-2 form reads as :-

“Combined application for removal of goods for export under claim for rebate of duty paid on excisable materials used in the manufacture and packing of such goods and removal of dutiable excisable goods for export under claim for rebate of finished stage Central Excise Duty or under bond without payment of finished stage Central Excise Duty leviable on export goods.”

10. The said form also requires a declaration to be given by the applicant. Clause (a) of the declaration is as under :

“(a) We hereby certify that we have not availed facility of CENVAT credit under CENVAT Credit Rules, 2001.”

11. In the light of the rule and notification quoted above, we have to examine whether the impugned order and the reasoning given therein quoted above, is in accord with the Rule and the notification or not.

12. The impugned order dated 16th February, 2010 has referred to the Central Board of Excise and Custom’s Excise Manual of Supplementary Instructions 2005. Paragraph 1.1 of the said manual states that these instructions are supplemental to, and should be read in conjunction with the Rules. These instructions are applicable throughout India and should not be departed from, without previous

approval of the Commissioner, who will, where necessary, obtain Board's sanction for any deviation.

13. Two sub-clauses of paragraph 1.5 of Part-V of Chapter 8 of the aforesaid manual have been quoted in paragraph 8 of the impugned order. However, clause (iii) has been incorrectly quoted in the impugned order as “where facility of input stage credit is ‘**available**’ under Cenvat Credit Rules, 2002”. The correct clause (iii) reads as : “(iii) Where facility of input stage credit is ‘**availed**’ under the Cenvat Credit Rules, 2002”. Thus, clause (iii) has been wrongly quoted and the word ‘availed’ has been written and read as ‘available’. The word ‘availed’ carries a different connotation and conveys a different meaning than the word ‘available’. The word ‘availed’ signifies actual utilization, whereas the word ‘available’ does not connote and mean actual utilization.

14. In paragraph 9 of the impugned order, it has been stated and held that an exporter cannot be allowed double benefit. To this extent, reading of the Rule and clause (iii) of the notification quoted above which uses the word ‘availed’ supports the said contention. However, the issue is whether in the present case the petitioner has availed of double benefit. The contention of the petitioner is that one does not avail double benefit by merely including or claiming the Cenvat credit on inputs or on manufacture, when it is not utilized or is only partly utilized. The contention of the petitioner is that he is not claiming any benefit on account of utilized Cenvat credit and the rebate is claimed

for the un-utilised Cenvat credit. In other words, the contention of the petitioner is that non-utilization of Cenvat credit is entitled to rebate in Rule 18 read with notification No. 41/2001 dated 26th June, 2001. This aspect has not been dealt with and examined in the impugned order.

15. Learned counsel for the respondent, in the course of arguments had relied upon Form ARE-2 to contend that a declaration has to be furnished by the applicant that they have not availed of Cenvat Credit under Cenvat Credit Rules. No doubt the Form and declaration have to be examined, but what is important and relevant is the interpretation of the words 'not availed of facility of Cenvat Credit' in the Form/declaration. It has to be examined whether these words mean and include even a part utilization of Cenvat Credit in respect of which no rebate is sought or refer to non-utilization of the Cenvat Credit in its entirety. In this connection, it may be relevant to refer to paragraph 4(c) of the notification No. 41/2001-CE (NT) dated 26th June, 2001. The said clause permits removal of waste on payment of duty if such waste is manufactured or processed outside the factory of the applicant seeking rebate. Therefore, removal of waste, or sale thereof in home or domestic market, does not prohibit or bar a claim for rebate under the said Rule or notification. Paragraph 4(c) does refer to payment of duty but the said clause applies when there is removal of material or the same is partially processed at the location different from or outside the factory of the applicant.

16. In paragraph 10 of the impugned order, reference was made to the case law cited by the petitioner that procedural lapses may be ignored, if there is substantial proof of export. The petitioner had not submitted Form No. ARE-2. The said form requires certification of the Customs Officer, but this aspect has not been examined by the Revisionary Authority. Constitutional Bench of the Supreme Court in a recent judgment in the *Commissioner of Central Excise, New Delhi vs. Hari Chand Shri Gopal and Ors.*, (2011) 1 SCC 236, have examined the question of interpretation of exemption or concession provision and whether it is to be strictly construed or not. After referring to earlier judgments in *Novopan India Ltd. v. CCE and Customs*, 1994 Supp(3)SCC 606; *Hansraj Gordhandas v. CCE and Customs*, (1969) 2 SCR 253 and *TISCO Ltd. vs. State of Jharkhand*, (2005) 4 SCC 272, the Supreme Court has opined:

“29. The law is well settled that a person who claims exemption or concession has to establish that he is entitled to that exemption or concession. A provision providing for an exemption, concession or exception, as the case may be, has to be construed strictly with certain exceptions depending upon the settings on which the provision has been placed in the Statute and the object and purpose to be achieved. If exemption is available on complying with certain conditions, the conditions have to be complied with. The mandatory requirements of those conditions must be obeyed or fulfilled exactly, though at times, some latitude can be shown, if there is a failure to comply with some requirements which are directory in nature, the non-compliance of which would not affect the essence or substance of the notification granting exemption.”

17. Thereafter, it has been observed that distinction must be made between a provision in a statute which is substantive and enacted with certain specific objective to fulfill objective of policy; and provisions which are procedural and technical in nature. The eligibility condition is to be given strict meaning; whereof the notifications have to be interpreted in terms of their language. But once the applicant-assessee satisfies and meets the eligibility conditions, procedural provisions have to be construed liberally. Then doctrine of substantial compliance applies. The said doctrine is equitable in nature and designed to avoid hardship. Substantial compliance depends upon facts and circumstances of each case, the purpose and object to be achieved in the context of exemption and purpose of the Rule and the Regulations. However, such defence cannot be pleaded if there is a clear statutory prerequisite which effectuates the object and purpose of the statute which has not been met. Substantial compliance means “actual compliance in respect of the substance essential to every reasonable objective of the statute”. In *Commissioner of Central Excise vs. Hari Chand Shri Gopal and Ors. (supra)*, it has been observed :-

“34. The test for determining the applicability of the substantial compliance doctrine has been the subject of a myriad of cases and quite often, the critical question to be examined is whether the requirements relate to the “substance” or “essence” of the statute, if so, strict adherence to those requirements is a precondition to give effect to that doctrine. On the other hand, if the requirements are procedural or directory in that they are not of the “essence” of the thing to be done but are given with a view to the orderly conduct of business,

they may be fulfilled by substantial, if not strict compliance. In other words, a mere attempted compliance may not be sufficient, but actual compliance with those factors which are considered as essential.”

18. Learned counsel for the petitioner had extensively referred to decision of Bombay High Court in *Repro India Ltd. vs. Union of India*, 2009 (235) ELT 614 (Bom). The said decision deals with Rule 6 of the Rules which is not the subject matter of the present writ petition. However, while interpreting Rule 6 with reference to exports, certain observations have been made. As we are remanding the matter back, the observations made in the said judgment which also throws light on the question of the object and purpose behind the provision for rebate/refund will be kept in mind by the Revisionary Authority. It may be noted that after the said judgment, notification No. 24 of 2010 was issued by the respondent on 26th May, 2010 but the said notification has not been given retrospective effect.

19. The Revisionary Authority will also keep in mind the decision of Delhi High Court in *Grasim Industries Ltd. vs. Union of India*, 2010(256) ELT 553 (Del), wherein following the judgment of Bombay High Court in *CCE, Nagpur vs. Indorma Textiles Ltd.*, 2006 (200) ELT 3 (Bom), it has been held that Rule 18 as framed stipulates that rebate of duty paid can be claimed either on excisable goods which are manufactured and exported or on the inputs and not both. It postulates ‘either/or’ situation or should not be read as ‘and’. Thus, rebate on duty cannot be granted on exported goods and inputs simultaneously.

20. In view of the aforesaid discussion, the impugned order dated 6th February, 2010 issued on 18th February, 2010 is set aside and the matter is remanded to the Revisionary Authority for fresh decision in accordance with law keeping in mind the observations made above. To avoid any delay, the petitioner will appear before the Revisionary Authority on 7th March, 2011 at 2.30 PM when a date of hearing will be fixed. Revisionary Authority will decide the matter expeditiously but not later than 4 months from 7th March, 2011.

The writ petition stands disposed of accordingly, with no order as to costs.

(SANJIV KHANNA)
JUDGE

(DIPAK MISRA)
CHIEF JUSTICE

FEBRUARY 14, 2011.
P/kkb