IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO. 113 OF 2005

The Commissioner of Central Excise }
Thane – I } Appellant
versus
M/s. Golden Process } Respondent

Ms. Suchitra Kamble for the Appellant.

Mr. Sujay N. Kantawala with Mr. Brijesh Pathak for the Respondent.

CORAM :- S. C. DHARMADHIKARI &
SUNIL P. DESHMUKH, JJ.
DATED :- FEBRUARY 27, 2015

P.C. :-

This Appeal by the Revenue challenges the order passed on 10th January, 2005 by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai.

2) Ms. Kamble appearing for the Revenue would submit that this Court has admitted this Appeal on the substantial questions of law. They are particularly, whether the Tribunal was right in giving benefit of deemed credit of 50% in terms of Notification Nos. 28 of 2000 dated 1st March, 2000, 7 of 2001 dated 1st March, 2001 and 28 of 2001 dated 11th June, 2001 to the Assessee/Respondent before us and thereafter, whether it was right in dispensing with the direction to pay interest and penalty.

3) Ms. Kamble submits that the Tribunal has completely lost sight of the fact that the Respondent/Assessee was not the successor in interest and in law. In fact, what appears and clearly from the show cause notice, according to Ms. Kamble, is that the erstwhile unit of M/s. Gaurav Synthetics did not claim the benefit of the Notifications and to which they were possibly entitled. They would have also been entitled to the benefit of Compounded Levy Scheme under section 3A of the Act/para of the Notification. The unit was operating under Ad-valorem Duty Scheme in the name of M/s. Gaurav Synthetics, but they leased out the premises to the Respondent w.e.f. 11th September, 2001. The application for availing option to pay duty under Compounded Levy Scheme under the Central Excise Rules, 2001 was rejected by the Commissioner. Ms. Kamble relies upon the Notification, copy of which has been annexed to this Appeal paper book at page 22, to submit that if there was an earlier unit which was working under Ad-valorem Duty Scheme and they leased out the premises, the present Assessee will not be entitled to the benefits of the scheme. It shall be considered as a new unit. Having found that it does not have the sanction to continue with the option to pay duty under Compounded Levy Scheme that the order-in-original should not have been interfered with by the Tribunal. Ms. Kamble, therefore, submits that this is not a case where the Tribunal's order can be sustained and in law. The Tribunal had no

jurisdiction to grant the benefit, which was expressly denied by the competent authority and the matter was never pursued by the Respondent/Assessee. Therefore it was entitled to pay the entire demand, namely in the sum of Rs.72,65,354/-. If that was not paid, both, interest and penalty were rightly imposable. The Tribunal has completely misdirected itself in law.

4) On the other hand, Mr. Kantawala appearing for the Respondent/Assessee would submit that the Tribunal's order is not perverse. The Tribunal found that the Assessee informed the Central Excise Department on 23rd January, 2002 to follow the procedure as stated in the order passed by CESTAT on 9th January, 2002 and thereafter made payment under Ad-valorem basis. The show cause notice which was issued was resisted by pointing out that the Assessee was entitled for duty credit under deeming provisions of law to the extent of 50% of the duty payable and since they had already paid Rs.36,37,677/-, which is more than sum equivalent to 50%, then, they were entitled to deemed credit. Thus, this stand, according to Mr. Kantawala was accepted and by relying upon Notification Nos. 28/2000 dated 31st March, 2000, 7 of 2001 dated 1st March, 2001 and 28 of 2001 dated 11th June, 2001. Since the duty is discharged and the values are not disputed, the Tribunal extended the benefit of deemed credit. There

is nothing illegal or erroneous in law and hence this Appeal must be dismissed. In any event, by passage of time, this issue has become academic.

5) We have considered the rival contentions and what we have noted is that the Respondent/Assessee was a processing and manufacturing unit. It was dealing in textile fabrics falling under Chapters 54 and 55 of the Central Excise Tariff Act, 1985. In the Memo of Appeal in the present case, the Revenue has pointed out that this unit was operating under Ad-veloram scheme in the name of M/s. Gaurav Synthetics as a partnership firm having partners Mr. Mohamed Arif Khan and Mr. Jayendra Nakhum. They did not prefer any application during 1st May, 2001 to 20th May, 2001 and continued to operate under section 4 of the Central Excise Act, 1944 till 10th September, 2001. From 11th September, 2001, the unit was leased to the present Assessee. The present Assessee applied for availing option to pay duty under the Compounded Levy Scheme under Rule 15 of the Central Excise Rules, 2001. The application in that behalf dated 12th September, 2001 was rejected and while rejecting the same, the Commissioner relied upon para 7(2) of Notification No. 32 of 2001 citing that in the said premises there existed an unit earlier named as M/s. Gaurav Synthetics, which was working under Ad-Veloram Duty Scheme. Having leased out the

premises, the present Assessee cannot be considered for any benefit even as a new unit in terms of proviso to *Explanation* to para 7(2) of the concerned Notification. However, the Commissioner directed that the Assessee shall pay duty under the Ad-valorem Scheme.

6) After having noted this undisputed fact, we are of the view that the show cause notice demanded differential duty. In the meanwhile, even the present Respondent continued to pay duty under the Ad-valorem Scheme. It paid that duty to the extent of 50% and which was accepted. If the stand of the Revenue was that it was not entitled to be considered as a new unit or was dis-entitled for any benefit and particularly under the Ad-veloram Duty Scheme, then, it is inexplicable as to why the Commissioner permitted them to pay duty under the said scheme, namely the Ad-veloram Scheme. It is that fact which has weighed with the Tribunal and that is how it has held the Assessee to be entitled to the benefit. If the application made on 12th September, 2001 for availing the option to pay duty under the Compounded Levy Scheme was rejected and as complained by the Respondent/Assessee, without any hearing, which fact was complained to the Tribunal, then, all the more we do not find that the Tribunal was prevented while adjudicating and considering the legality and validity of the show cause notice and the order-in-original. If partially the

Department was to be blamed and for the state of affairs which we have noted above, then, it can hardly complain. The show cause notice was issued, but in the teeth of the fact that the Assessee/Respondent was entitled to avail of the benefit of the Ad-veloram Scheme. Despite issuance of such show cause cum demand notice, if the Assessee paid duty under the scheme, then, that fact has rightly weighed with the Tribunal. In these circumstances, we do not think that the questions of law and termed as substantial really arise for determination and consideration in this Appeal. They would have been considered in distinct circumstances and facts which are not identical to the present case. Therefore, the legality and validity of the course adopted by the Tribunal can be considered in a more appropriate case. Having found that the issue is really academic and after the scheme has ceased to exist nor the unit of the Respondent/Assessee functioning that we are of the view that this Appeal can be disposed of. It is disposed of by confirming the order of the Tribunal, but holding that it is confined to the facts and circumstances of the Respondent/Assessee's case and does not lay down any general rule. The Appeal is accordingly disposed of. No costs.

(SUNIL P. DESHMUKH, J.) **(S.C.DHARMADHIKARI, J.)**