THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.9.2015

CORAM

THE HONBLE MR.JUSTICE V.RAMASUBRAMANIAN
and
THE HON'BLE MR.JUSTICE T.MATHIVANAN

Civil Miscellaneous Appeal No.1111 of 2010

The Commissioner of Customs (Port Exports)
No.60, Rajaji Salai
Custom House
Chennai 600 001. ..Appellant

Vs.

1. M/s. Brakes India Ltd.
Padi, Chennai 600 050.

2. Customs Excise & Service Tax Appellate Tribunal
South Zonal Bench
Shastri Bhawan Annexe
1st Floor, 26, Haddows Road
Chennai 600 006. ..Respondents

Appeal under against the order dated 24.01.2007 made in Final Order No.56 of 2007 on the file of the second respondent

For Appellant : Mr.T.Chandrasekaran
For Respondent-1 : Mr.R.Parthasarathy
For M/s. Lakshmi Kumaran

J U D G M E N T
(Delivered by V.Ramasubramanian,J.)

The Commissioner of Customs has come up with the above appeal under Section 130 of the Customs Act, 1962, raising the following substantial questions of law for our consideration:

"1. Whether the Tribunal was correct in sustaining the appeal on a ground that not considered in the impugned order?

2. Whether a miscellaneous provision of law can be invoked to permit a thing, which

is prohibited by a specific provision?

3. Whether the Tribunal can exercise the discretion of the proper officer under Section 149 of the Customs Act, 1962, especially when the proper officer has had no opportunity to exercise the same?"

2. Heard Mr.T.Chandrasekaran, learned counsel for the appellant/ revenue and Mr.Parthasarathy, learned counsel appearing for the first respondent.

3. The respondent/assessee had the benefit of exemption under Notification No.45/2002 Customs dated 22.4.2002 for debiting DEPB credit equal to the duty payable. The respondent used to take credit of countervailing duty paid in their CENVAT account. It is relevant to that the Exim Policy for the period 1999-2004 prohibited the taking of CENVAT credit of CVD paid using DEPB credit.

4. However, in a decision rendered in Polyhose India Pvt. Ltd. v. CCE [2013 (152) ELT 361], the Tribunal held that the importers paying CVD using DEPB credit could also take cenvat credit of the same.

5. However, the jurisdictional officers initiated proceedings against the assessee, forcing the assessee to make a request on 03.6.2004. What the respondent/assessee actually requested in their representation was for "re-assessment of their Bill of Entries". But, the only object of the assessee in making such a request was to enable them to pay CVD by cash and to seek equivalent credit in DEPB Scrip. To put it differently, the assessee wanted to incorporate in the Bill of Entries, a different method of payment of CVD than what was indicated in the original Bill of Entry. The assessee should have used appropriate language, namely "amendment of Bill of Entries". But, unfortunately, they used a wrong expression, namely "re-assessment of Bill of Entries".

6. Therefore, by invoking Section 17(4), the Original Authority as well as the Appellate Authority rejected the claim holding that a re-assessment is possible under the statutory provisions, only at the instance of the revenue and not at the instance of the assessee. When the assessee took the matter on appeal to the CESTAT, the Tribunal agreed with the contention of the assessee that under Section 149, an amendment of the Bill of Entries was possible. Therefore, the Tribunal directed the Assessing Officer to allow the assessee to carry out the amendment of the Bills of Entries. Aggrieved by the said order of CESTAT, the Revenue is before us.

7. If we strictly go by the questions of law framed, we would have no alternative except to answer them in favour of the revenue. The first question of law raised was as to whether the Tribunal could sustain an appeal on a ground that was not considered in the impugned order. Theoretically, our answer would be in the negative, that is in favour of the revenue.

8. Similarly, the second question of law is as to whether a residuary provision, such as the one in Section 149 can be resorted to when something is not permissible under a specific provision dealing with assessment. Even here, if we divest this case from the rest and look at the question of law on a theoretical basis, it is correct to say that if something is not permitted by a specific provision, neither of the parties can take recourse to a residuary or an omnibus provision.

9. But, unfortunately, what the Original as well as the first Appellate Authorities had lost sight of is the fact that the assessee actually wanted the entries in their Bill of Entries to be modified only for the purpose of enabling them to make payment in cash. In substance, the request made on 03.6.2004 was only for amendment of the Bill of the Entries. But, unfortunately, the assessee used a wrong expression "re-assessment of Bill of Entries" and did not quote the provision of law. It is not necessary for an assessee, while making a request to the jurisdictional Excise Officer to quote a provision of law or to use only the proper language as stated in the statute. It could have been a different matter if the statute prescribes a particular form for making an application for amendment of the Bill of Entry. If a form had been prescribed in the Act or in the Rules, the form itself would contain the relevant provision. In the absence of any such form, what the assessee substantially wants, is what matters more than the form or the language in which the prayer is couched.

10. Therefore, we are of the clear view that without quoting Section 149 and without using the appropriate language relevant for the action, namely "Amendment of Bill of Entries", the assessee had used the wrong expression "re-assessment". This cannot be taken advantage of by the Department to deprive the assessee from making use of DEPB Scrip for claiming credit and also disabling them to make payment in cash.

The assessee cannot be made to lose on both sides, by quoting a simple provision of law and raising a theoretical proposition. Therefore, the third question of law is answered against the revenue and the appeal is dismissed. No costs.

-Sd/-
Assistant Registrar

//True copy//

Sub Assistant Registrar

kpl

To
Customs Excise & Service Tax Appellate Tribunal
South Zonal Bench
Shastri Bhawan Annexe
1st Floor, 26, Haddows Road
Chennai 600 006.

+1 cc to Mr.T.Chandrasekaran,Advocate(sr.49770)

C.M.A.No.1111 of 2010.

TS(co)
cp 19/10/2015