

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.07.2015

C O R A M

THE HONOURABLE MR.JUSTICE R.SUDHAKAR
and
THE HONOURABLE MS.JUSTICE K.B.K.VASUKI

C.M.A.No.1449 of 2007
and M.P.No.2 of 2007

The Commissioner of Central Excise
Pondicherry Commissionerate
Goubert Avenue, No.1, Beach Road
Pondicherry-605 001Appellant

Vs

1.M/s.SPIC Pharmaceuticals Division
C-14-16, SIPCOT Complex
Kudikadu, Cuddalore-607 005

2.Customs, Excise and Service Tax
Appellate Tribunal,
South Zone Bench
Shastri Bhavan Annexe, 1st Floor
Haddows Road
Chennai-600 006 Respondents

C.M.A., filed under Section 35G of Central Excise Act against
the Final Order No.79/2006 dated 03.02.2006, passed by the Customs,
Excise and Service Tax Appellate Tribunal, Chennai-600 006.

For appellantMr.V.Sundareswaran,
Standing Counsel for Central Excise Dept.

JUDGMENT

(Judgment of the Court was delivered by R.SUDHAKAR, J.)

The Revenue is on appeal as against the order of the
Customs, Excise and Service Tax Appellate Tribunal (hereinafter
called as CESTAT) dated 03.02.2006 raising the following substantial
question of law:-

"Whether Modvat Credit can be allowed to the buyers based on the invoices of the suppliers showing particulars of duty, though in reality no duty was admittedly paid on the goods by the suppliers"?

2. Even though the 1st respondent-assessee has been noticed and his name also printed in the cause list, there is no appearance for them either in person or through counsel.

3. The first respondent/assessee is manufacturers of Pencillin G Potassium First Crystals and 6 APA falling under Chapter Sub Heading 2941.10 and are availing the facility of Modvat credit for both Inputs and Capital Goods.

4. The assessee had availed Modvat credit to the tune of Rs.2,47,406/- on the goods under 36 invoices issued by M/s.Indian Oil Corporation Limited, Chennai. The goods received by the assessee were customs duty paid goods and Central Excise duty was not paid on them. Thus, on account of the contravention of the provisions of Rule 57 G inasmuch as the assessee had availed modvat credit on which no duty had been paid, a show cause notice under O.C.No.1235/99 dated 06.05.1999 was issued by Range Officer, Range II requiring the assessee to show cause as to why (i) the credit of Rs.2,47,406/- should not be disallowed and where the duty had already been utilised, why the amount equivalent to such credit should not be recovered from under Rule 57 I of Central Excise Rules, 1944 ; (ii) penalty should not be imposed on them under Rule 173 Q of Central Excise Rules, 1944.

5. The assessee filed their reply dated 25.05.1999 stating that they had availed modvat credit against the duplicate copies of invoices issued by M/s.Indian Oil Corporation Limited, Chennai wherein Excise duty had been charged @ 15% advalorem for the furnace oil supplied to them and the payment was also made to them including the excise duty amount; that they had availed modvat credit against the payment of excise duty which was collected from them by the supplier M/s.Indian Oil Corporation Limited and that therefore there was no reason to deny duty credit availed by them. Therefore, the assessee prayed before the Department to drop the further proceedings and further requested for Personal Hearing.

6. The assessee was granted an opportunity of hearing on 15.09.2000 and again, the assessee filed a letter dated 26.09.2000 and submitted that they had checked up with M/s.Indian Oil Corporation Limited, Chennai and that they had understood that Indian Oil Corporation Limited had shown excise duty on the assessable value of Furnace Oil and the same was collected by them; that however, the duty had not been paid by them in their P.L.A., and that therefore they had expunged the said credit of Rs.2,47,406/- as per the details given in Show Cause Notice No.26/99 dated 06.05.99 vide their Part II Serial No.980 in RG23A and requested to drop the proceedings.

7. However, the Adjudicating Authority passed the order dated 27.10.2000 confirming the contravention alleged in the show cause notice, thereby, disallowing the credit of Rs.2,47,406/- under Rule 57 I of Central Excise Rules, 1944 and further imposing a penalty of Rs.2,47,406/-.

8. Aggrieved by the same, the assessee preferred Appeal before the Commissioner of Central Excise (Appeals), viz., the First Appellate Authority. Before the First Appellate Authority, the assessee contended that the reasoning of the Lower Authority does not hold good in the light of the CESTAT ruling in R.S.Industries Vs. CCE, New Delhi reported in 2003 (153) ELT 114(T). The First Appellate Authority after considering the contention raised and in the light of above referred to decision, allowed the appeal and set aside the order of the lower authority and vacating the penalty too.

9. Aggrieved by the same, the Department preferred appeal before the Customs, Excise and Service Tax Appellate Tribunal and distinguished the case of R.S.Industries Vs. CCE, New Delhi (supra) that duty had been subsequently recovered from the input-supplier unlike in the instant case and the assessee herein had taken input-duty credit on the strength of invoices issued by input supplier who had themselves availed similar credit on the same goods on the basis of bogus invoices. However, the CESTAT pointed out that there is no dispute of receipt of inputs by the assessee in their factory under cover of invoices issued by M/s.Indian Oil Corporation, which contained duty payment particulars and thus rejected the Revenue's appeal.

10. Challenging the same, the Revenue is before us by way of this appeal.

11. We have heard Mr.V.Sundareswaran, the learned Standing Central Government Standing Counsel appearing for the Department.

12. During the course of hearing, the learned Standing Counsel appearing for the Department fairly submitted that the CESTAT failed to take note of the fact that there is an admission by the first respondent/assessee in their letter dated 26.09.2000 that on verification, it has been found that no duty had been paid by the M/s.Indian Oil Corporation Limited and they voluntarily reversed the Modvat credit of Rs.2,47,406/- as per the details given in Show Cause Notice.

13. We have perused the Order-in-Original, dated 27.10.2000, of the Assistant Commissioner of Central Excise, Central Excise Division, Cuddalore, wherein, it has been observed as follows:-

"The assessee again filed a letter dated 26.09.2000 and submitted that they had checked up with M/s.Indian Oil Corporation Limited, Chennai and that they had understood that Indian Oil Corporation Limited had shown excise duty on the

assessable value of Furnace Oil and the same was collected by them; that however, the duty had not been paid by them in their P.L.A., and that therefore they had expunged the said credit of Rs.2,47,406/- as per the details given in Show Cause Notice No.26/99 dated 06.05.99 vide their Part II Serial No.980 in RG23A and requested to drop the proceedings."

14. As rightly pointed out by the learned Standing Counsel for the Department, the above fact has not been considered by the CESTAT in proper perspective, while rejecting the Revenue's appeal. On this ground, we set aside the order of the CESTAT dated 03.02.2006 and the matter is remanded to Customs, Excise and Service Tax Appellate Tribunal for de novo consideration.

15. In the result, the Appeal stands allowed. No costs. Consequently, connected M.P.No.2 of 2007 is closed.

Sd/-Sd/-
Asst.Registrar (CS IV)

/true copy/

Sub Asst. Registrar

nvsri

To

1.Customs, Excise and Service Tax
Appellate Tribunal,
South Zone Bench,
Shastri Bhavan Annexe, Ist floor
Haddows Road,
Chennai-600 006

2.The Commissioner of Central Excise (Appeals)
26/1 Mahatma Gandhi Road,
Chennai-34

3.The Assistant Commissioner of Central Excise
Central Excise Division Cuddalore

+1 cc to Mr.V.Sundareswaran Advocate sr.34691

C.M.A.No.1449 of 2007

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