IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 4.9.2015.

CORAM

THE HON'BLE MR.JUSTICE V.RAMASUBRAMANIAN
AND
THE HON'BLE MR.JUSTICE T.MATHIVANAN

C.M.A.No.2939 of 2008

The Commissioner of Central Excise
and Service Tax Large Taxpayer Unit,
1775, Jawaharlal Nehru Inner Ring Road,
Anna Nagar Western Extension,
Chennai 600 101. Appellant/Respondent

vs.

1. M/s.Tamilnadu Petroproducts Limited,
Manali, Chennai 600 068. Respondents/Applicant

2. The Customs Excise and Service Tax
Appellate Tribunal,
South Zonal Bench,
Shastri Bhavan Annexe, I Floor,
26, Haddows Road,
Chennai 600 006. Respondent/Nil

Civil Miscellaneous Appeal against the order No.191 of 2008 dated 4.3.2008 in Appeal Nos.S/PD/162/07 & S/220/07 on the file of the Customs Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

For appellant : Mr.A.P.Srinivas, Senior Panel Counsel
For R1 : Mr.N.Prasad
For R2 : Tribunal

JUDGMENT
(Judgment of the Court was delivered by V.RAMASUBRAMANIAN, J.)

This appeal is by the Revenue under Section 35G of the Central Excise Act, 1944.

2. Heard Mr.A.P.Srinivas, learned Senior Panel Counsel for the appellant and Mr.N.Prasad, learned counsel for the first respondent.

3. The first respondent is a Government of Tamil Nadu

Undertaking incorporated as a Public Limited Company. They are the manufacturers of various organic and inorganic chemicals. They are registered as a manufacturer and they are also registered with the Department of Central Excise, for the service of "transport of goods by road". The assessee has been availing CENVAT credit on various inputs and capital goods under the CENVAT Credit Rules and they are utilising the same for payment of duty on their finished goods. They are also paying service tax on the freight charges for the inward transfer of inputs and capital goods to their factory and outward transport of finished goods.

4. Upon gathering intelligence, a surprise inspection was conducted in January 2006 and it was found that the first respondent/assessee had used CENVAT credit as against the service tax paid by them prior to 1.1.2005. There was no liability for payment of service tax on inward transportation and outward transportation upto the stock point prior to 1.1.2005.

5. Therefore, the show cause notice was issued on 1.5.2006, proposing to recover the amount representing the CENVAT Credit wrongly availed and also for imposing a penalty and interest.

6. The first respondent/assessee filed a reply after which an order in original was passed on 31.7.2006 making a demand for a sum of Rs.6,89,543/- representing the quantum of CENVAT Credit wrongly availed. It must be pointed out here that before the order in original was passed, the first respondent also paid the amount by way of a debit entry. However, the original authority directed the charge of interest under section 11AB and also imposed penalty of Rs.5000/-.

7. The first respondent filed an appeal, but, the same was dismissed insofar as the demand and the portion of interest is concerned. The imposition of penalty alone was set aside by the first appellate authority.

8. But, the further appeal filed by the first respondent was allowed by CESTAT by an order dated 4.3.2008. Aggrieved by the said order, the Commissioner of Excise has come up with the above appeal.

9. It is an admitted fact that the first respondent/assessee was not liable to pay service tax on the transportation of goods both inward and outward upto 31.12.2004. The liability was imposed only with effect from 1.1.2005. But, unfortunately, the first respondent/assessee paid service tax, even at a time when there was no liability on them. Since they made payment of tax under the impression that they were due to pay, they claimed CENVAT Credit to that extent. It is not the case of the

Department that the first respondent claimed CENVAT Credit in respect of an amount that they had not paid or in excess of the amount that they have paid. The only grievance of the Department is that if the assessee had paid tax which they were due to pay or if they had paid duty in excess of what they are liable to pay, the only course open to them is to claim refund and not to make use of CENVAT Credit. But, we do not think so. If, upon a misconception of the legal position, the assessee had paid the tax that he was not liable to pay and such assessee also happens to be an assessee entitled to certain credits such as CENVAT Credit, the availing of the said benefit cannot be termed as illegal. Therefore, we find no infirmity in the order of the Tribunal. The question of law is answered against the Revenue and the appeal is dismissed. No costs.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

ssk.

To

The Customs Excise and Service Tax
Appellate Tribunal,
South Zonal Bench,
Shastri Bhavan Annexe, I Floor,
26, Haddows Road,
Chennai 600 006.

+1cc to Mr.N. Inbarajan, Advocate, S.R.No.47846
+1cc to Mr.A.P. Srinivas, Advocate, S.R.No.48403

VGI(CO)
EU(28/10/2015)