THE HON'BLE SRI JUSTICE G. CHANDRAIAH

AND

THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM

C.E.A No. 77 of 2005

ORDER :- (per Hon'ble Sri Justice G. Chandraiah)

This appeal, at the instance of Revenue, is directed against the order dated 09.02.2005 passed by CESTAT, South Zonal Bench, Bangalore.

2. Aggrieved by the order in O.R.No.6/2000 (*de novo*) dated 25.06.2003, passed by the Commissioner of Central Excise, Guntur, holding the respondent liable to pay 8% on the price of the exempted goods i.e. Sulphuric Acid cleared by them under Rule 57CC of the Central Excise Rules, 1944, on the ground that the assessee had used the input i.e., Vanadium Pentoxide in respect of both dutiable products – Sulphuric Acid cleared on payment of duty as well as exempted products – Sulphuric Acid used captively in the manufacture of fertilizers, the respondent-Corporation filed appeal before the Tribunal. The Tribunal, by the impugned order, has set aside the Order (*de novo*) dated 25.06.2003 on the ground that during the relevant period i.e. 01.08.1996 to 15.06.1999 there was no recovery machinery to recover the amount.

3. Both the learned counsels have sought to advance arguments on the merits of the case. Learned Standing

Counsel for the appellant/Department sought to argue that the respondent-Corporation is engaged in the manufacture and clearances of Sulphuric Acid falling under Chapter Sub Heading No.2807.00 of the Schedule to the Central Excise Tariff Act, 1985, and that the Sulphuric Acid which is chargeable to duty was also cleared by the unit at Nil rate of duty to M/s Fertilisers Corporation of India for usage in the fertilisers, and that the unit was availing the MODVAT benefit in terms of Rule 57A of the erstwhile Central Excise Rules, 1944. During the period from August 1996 to 15.06.1999, the respondent availed MODVAT credit on the input viz., Vanadium Pentoxide used in the manufacture of Sulphuric Acid, and hence, the respondent is liable to pay duty and after following due process of law i.e. after issuing notice and affording an opportunity of hearing, the Commissioner, Customs and Central Excise, passed the order dated 25.06.2003 and without assigning reasons, the Tribunal had set aside the order passed by the Commissioner. The learned counsel further submits that though at the time of adjudicating the matter, the amendment was not there, but the Government of India, vide Clause 82 of the Finance Act, 2005, read with provisions of Section 37 of the Central Excise Act, 1944, amended the provisions of Rule 57CC of the Rules retrospectively, i.e. with effect from 01.08.1996.

4. Per contra, the learned counsel for respondent-Corporation would submit that the Tribunal has set aside the order dated 25.06.2003 only on the ground of non-availability of recovery machinery, and therefore, it is not open for the

appellant to raise several other aspects and questions of facts and law.

5. A perusal of the impugned order would disclose that the Tribunal has set aside the order dated 25.06.2003 passed by the Commissioner on the ground of absence of recovery machinery, and that in the absence of any mechanism for recovery of the amount, the Commissioner of Central Excise ought not to have passed the order dated 25.06.2003 ordering recovery of duty payable by the respondent-Corporation.

6. Having considered rival contentions and on perusal of the material on record, we are of the view that the impugned order does not speak on the merits of the case and legal aspects. Therefore, we feel it appropriate to remand the matter to the Tribunal for fresh consideration, by keeping it open to both the parties to raise all their contentions on factual and legal aspects, available to them under law.

7. Accordingly, the impugned order dated 09.02.2005 passed by the Tribunal is set aside and the matter is remanded to the Tribunal for fresh consideration and disposal after affording an opportunity of hearing to both the parties. Having regard to the fact that this matter is of the year 2003 and the recovery in issue pertains to the period 1996 to 1999, we are inclined to observe that the Tribunal may dispose of the appeal as expeditiously as possible, preferably within a period of six months from the date of receipt of a copy of this order.

8. The appeal stands disposed of, accordingly. No costs. Miscellaneous petitions, if any pending in this appeal, shall stand closed.

G. CHANDRAIAH, J

CHALLA KODANDA RAM, J

15th July, 2015

ksm

<u>THE HON'BLE SRI JUSTICE G. CHANDRAIAH</u>

<u>AND</u>

<u>THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM</u>

-

-

-

-

-

-

-

-

-

-

-

-

-

C.E.A No. 77 of 2005

15th July, 2015

ksm